In The

Supreme Court of the United States

October Term, 1976

No. 76-904

FLM COLLISION PARTS, INC.,

Petitioner,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FLM COLLISION PARTS, INC.,

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FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

---------------------------------------x

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, by its attorneys, Julien & Schlesinger, P.C., respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 30, 1976 and the order denying a rehearing and/or a rehearing en banc entered on November 16, 1976.

Opinions Below

The Court of Appeals opinion is not yet officially reported. It is found in 1976-2 Trade Cases, ¶ 61,103 at p. 69,998. The opinions of the district court are found at 406 F.Supp. 224 (S.D.N.Y. 1975), and a supplemental opinion on damages is found at 411 F.Supp. 627 (S.D.N.Y. 1976).

Jurisdiction

The Court of Appeals order was entered on September 30, 1976 and the order denying a rehearing and/or rehearing en banc was entered on November 16, 1976. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is being invoked pursuant to 28 U.S.C. 1254(1).

Questions Presented

1. Does the Robinson-Patman Act, 15 U.S.C. 13(a), permit a manufacturer to discriminate in price between different purchasers of the exact same auto part which discrimination is based solely upon whom its purchaser resells those auto parts to?

2. Can a manufacturer of auto parts obviate the Robinson-Patman Act by selling the same goods to different purchasers at different prices based solely upon whom its purchasers resell those goods to by claiming that there is no discrimination so long as all of its direct purchasers are charged the same price depending upon whom the goods are resold to?

3. Does a manufacturer imposing a radical price difference upon his distributors depending upon whom they resell its products to in essence limit the customers to whom its distributors may freely sell the manufacturer's products in violation of Section 1 of the Sherman Act and particularly the doctrine enunciated in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)?

4. In order to constitute a contract in restraint of trade prohibited by Section 1 of the Sherman Act and by Schwinn, supra, must a contract clearly state that the distributor is prohibited from reselling to certain customers or does the fact that the distributor is prohibited from reselling to customers except at a highly inflated price in itself

contain an economic restriction as to which customers the distributor may deal with as found by the Eighth and Fifth Circuits in Reed Brothers, Inc. v. Monsanto Company, 525 F.2d 486 (8th Cir. 1975), cert. den., 96 S.Ct. 787 (1976); and Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976)?

Statutes and Regulations Involved

15 U.S.C. 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to, which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or

between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. 13(a)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent

differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, or obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

Statement of the Case*

FLM Collision Parts, Inc. ("FLM") is a New York Corporation founded in 1965. FLM has been in the business of purchasing crash parts for Ford Motor Company ("Ford") automobiles from franchised Ford dealers at two to five percent above the franchised dealer's cost and reselling those crash parts to independent service stations and repair shops. Crash parts are those automobile parts used to replace damaged parts on automobiles usually after an automobile has been involved in a collision.

*A complete statement of facts is contained in the district court's initial decision, 406 F.Supp. 224 (S.D.N.Y. 1975) (a-27).

Ford crash parts are manufactured only by Ford and available only through Ford. Ford sells crash parts only to franchised Ford dealers. The franchised Ford dealers use crash parts both in their own repair work and for resale to independent service stations and repair shops. All persons who wish to obtain crash parts must necessarily obtain them through franchised Ford dealers.

Crash parts differ from other Ford automobile parts such as batteries and spark plugs in that crash parts are "captive" parts available only through Ford and distributed through its franchised dealers while other parts are distributed by Ford through a different system involving independent distributors as well as franchised Ford dealers.

Once a franchised Ford dealer purchases crash parts from Ford, all title and risk of loss with respect to those crash parts passes to the franchised dealer.

Some time prior to November 1, 1968, the Federal Trade Commission advised Ford that its method of distributing crash parts was an unfair method of competition and placed independent repair shops in an unfavorable competitive position. Since crash parts were only available through franchised Ford dealers who used these parts for both repairs in their own shops and at the same time acted as wholesalers of crash parts to independent repair shops, the independent repair shops were at a disadvantage in competing for repair work since they were compelled to buy crash parts from franchised Ford dealers at a price

naturally above that paid by the franchised Ford dealer for the same part used in its own repair operation.

The Federal Trade Commission recommended that Ford make arrangements to sell crash parts directly to independent repair shops and wholesalers. Ford, to avoid having to sell crash parts to any one other than franchised Ford dealers, and seeking to avoid a proceeding by the Federal Trade Commission, instituted a "wholesale incentive allowance" for crash parts to be effective on or about November 1, 1968. The wholesale incentive allowance gave the franchised Ford dealer an additional discount (20 - 25 percent) on all crash parts which the dealer did not use in its own repair operation, but for which it acted as a wholesaler and resold to other persons.

From the time this wholesale allowance was created by Ford, the franchised Ford dealers from whom FLM would purchase crash parts would pass this allowance along to FLM and FLM continued to compete with Ford dealers in the sale of crash parts to independent repair shops.

Some time prior to July 1, 1971 Ford changed its wholesale incentive plan so that franchised Ford dealers would no longer receive the wholesale incentive on parts sold to FLM. The franchised dealer would only receive the wholesale incentive on sales made directly to independent repair shops.

The district court found that at the time Ford made this change in its wholesale incentive plan, FLM was the sole non-franchised Ford dealer which

was acting as a wholesaler of crash parts (406 F.Supp. at 234), and that Ford personnel responsible for the change in the wholesale incentive policy had FLM specifically in mind as the type of successful independent wholesaler Ford was attempting to discourage (406 F.Supp. at 236).

Ford's change in its wholesale incentive plan in essence made it impossible for FLM to successfully compete with franchised Ford dealers in the sale of crash parts. To use the example used by the Court of Appeals (a-12), a $10 retail part would cost a franchised Ford dealer $6, however, once the franchised Ford dealer received the wholesale incentive allowance -- 25% -- its price for that part would now be $4.50, while FLM would be paying the full $6 since there would be no whole-

sale incentive permitted plus the additional five percent franchised Ford dealer mark-up, for a total of $6.30.

Ford claims that its wholesale incentive plan was revised in order to avoid independent wholesalers from acting as conduits between franchised Ford dealers where one franchised Ford dealer would sell crash parts to an independent wholesaler, thus receive the 25 percent wholesale incentive allowance, the independent wholesaler would then resell the crash parts to a second and different franchised dealer who would again seek the 25 percent wholesale incentive allowance upon selling the same parts.

Admittedly, FLM did not act as a conduit in transferring crash parts from one franchised dealer to another and Ford who had on two separate occasions

in 1969 and 1970 audited FLM's books found that FLM had done nothing improper and had obtained no unwarranted wholesale incentive allowances. In fact, as the district court found, Ford had not experienced any difficulties with respect to the wholesale incentive allowance relating to crash parts. Ford's difficulties had been with other parts which it sold through a wholly different distribution system involving independent distributors as well as franchised dealers (406 F.Supp. at 245).

FLM commenced this action in the United States District Court for the Southern District of New York pursuant to 15 U.S.C. 15.

After a seven-day trial before the Court without a jury, Judge Griesa, United States District Judge, for the

Southern District of New York, found that Ford had violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a) by charging franchised Ford dealers different prices, i.e., a 25 percent difference, depending upon whether or not crash parts were resold by franchised dealers to independent repair shops or to other persons, to wit, FLM. Judge Griesa dismissed FLM's claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.

In a supplemental opinion regarding damages, 411 F.Supp. 627 (S.D.N.Y. 1976), Judge Griesa awarded FLM $291,502 in damages, which amount was trebled and, in addition, awarded FLM a reasonable attorneys' fee in the sum of $135,000 and enjoined Ford from further violations of the Robinson-Patman Act pursuant to 15 U.S.C. 26.

The Court of Appeals for the Second Circuit affirmed Judge Griesa's decision with respect to the dismissal of FLM's Sherman Act claims and reversed the district court's findings that Ford violated the Robinson-Patman Act.

The Court of Appeals' decision is directly contrary to the clear mandate of this Court and this Court's interpretation of the Robinson-Patman Act in <u>Perkins v. Standard Oil Co. of California</u>, 395 U.S. 642 (1969); and <u>F.T.C. v. Fred Meyer, Inc.</u>, 390 U.S. 341 (1968).

Similarly, the Court of Appeals' decision affirming the dismissal of FLM's claims under Section 1 of the Sherman Act is directly contrary to this Court's decision in <u>United States v. Arnold, Schwinn & Co.</u>, 388 U.S. 365 (1967).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Makes Section 2(a) of the Robinson-Patman Act a Nullity

Section 2(a) of the Robinson-Patman Act provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * . * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * * ." (emphasis added)

In our case, Ford admittedly charges a franchised dealer 25 percent more for the exact same crash part if that crash part is resold to FLM or someone other than an independent repair shop.

Ford's position, which was accepted by the Court of Appeals in a superficial decision and does not withstand analysis, and which would make a mockery of the Robinson-Patman Act, is that there was no price discrimination since all franchised Ford dealers were charged the same price for crash parts depending upon whom they resold to.

If one looks at the history and purpose of the Robinson-Patman Act, it becomes clear that the Court of Appeals' decision is improper and would basically make a nullity of Section 2(a) of the Robinson-Patman Act.

The purpose behind the Robinson-Patman Act was to prevent chain stores from driving the small merchant out of business who because of superior purchasing power were able to demand price conces-

sions from suppliers against which small merchants could not compete. See, Rowe: <u>Price Discrimination Under the Robinson-Patman Act</u>, Chapter 1 (1962); and Rowe, "The Evolution of the Robinson-Patman Act: A Twenty Year Prospective", 57 Col. L. Rev. 1059, 1062 (1957).

The purpose of the Robinson-Patman Act was "for preservation of equal opportunity to all" (S. Rep. No. 1502, 74 Cong. Second Sess. 3 (1936)) and to make certain that everyone received the same price except to the extent that the price difference was "cost justified" -- the supplier saved packing, shipping or other expenses.

Congressman Utterback in reporting to the House of Representatives on the Robinson-Patman bill stated what the Act intended:

> "<u>A customer granted the benefit of a discrimination may receive it only on the basis of the difference between his methods or quantities of purchase and delivery and those of other customers not receiving the differential.</u>
>
> The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken." 80 Cong. Rec. 9417 (1936) (emphasis added)

If Ford's position which was accepted by the Court of Appeals is permitted to stand, Section 2(a) of the Robinson-Patman Act would for all practical purposes become non-existent. A supplier that wishes to give a chain store or other favored customer a favorable price which is not cost justified would simply have to act through a wholesaler rather than sell directly to the chain store in order to

avoid Section 2(a) of the Robinson-Patman Act. A supplier would simply charge its wholesalers a different price, not cost justified, depending upon whom the wholesaler resold the goods to, e.g., charging a wholesaler 50¢ for an item if the wholesaler resells that item to a chain store and a dollar for the very same item if it is resold to anyone other than the favored customer. According to the Court of Appeals decision, there would be no discrimination in price so long as all of the wholesalers were charged the same price by the supplier, depending upon whom they resold to.

If the Act is construed in the manner it has been construed by the Court of Appeals in our case, it would make a mockery of the Robinson-Patman Act and

"would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." Perkins v. Standard Oil Company of California, 395 U.S. 642, 647 (1969). See, also, Note: 12 N.Y.L.F. 91, 99 (1966) where the author points out that even prior to Perkins, if a supplier could insulate itself from liability by simply adding an additional link in the chain of distribution, it would make a mockery of the Robinson-Patman Act.

A supplier is permitted to sell to all purchasers at the same price regardless of whether they are wholesalers or retailers. See Bird & Son, Inc., 25 F.T.C. 548 (1937). A supplier, however, is not permitted to charge different prices to its customers when prices are not cost justified and the

price difference is based solely upon the supplier's arbitrary determination that its customers should be charged less if they sell to certain favored persons and more if they resell to others. An arbitrary classification of purchasers by a supplier does not permit it to charge different prices for the same goods. See Mueller Co. v. F.T.C., 323 F.2d 44, 45 (7th Cir. 1963), cert. den., 377 U.S. 923 (1964).

The Court of Appeals in its decision states that the Robinson-Patman Act does not prohibit a supplier

> "from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler." (a-13)

and compares Ford's discriminatory wholesale incentive plan to a standard "func-

tional discount" (a-18) which is entirely without a basis in fact. As the district court pointed out in its decision, functional discounts are permitted by the Robinson-Patman Act. That is, Ford may charge a Ford distributor less for parts which it sells as a wholesaler than for parts which it sells as a retailer. However, what Ford is doing here is an Alice in Wonderland construction of what the functional discount is. The standard functional discount always operates so that a higher price is charged to purchasers at a level farther from the supplier in the chain of distribution, i.e., a retailer is charged more than a wholesaler. See Rowe: Price Discrimination Under the Robinson-Patman Act, 173, et seq. (1962). See, also, Kelley, "Functional Discounts Under the Robinson-Patman Act", 40 Cal. L. Rev. 526 (1952);

and The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) in considering functional discounts stated:

> "The typical functional or trade discount system provides for graduated discounts to customers classified according to place in the distribution chain - e.g., the seller's schedule may specify percentage reductions to wholesalers, jobbers, and retailers in diminishing amounts."

The practice of permitting "functional discounts" or different prices to be charged to wholesalers than to retailers has been permitted because the charging of different prices to wholesalers and to retailers does not have an adverse effect on competition since wholesalers and retailers do not compete with each other. See Mennen Co. v. F.T.C., 288 F. 774, 781 (2d. Cir.), cert. den., 262 U.S. 759 (1923).

In our case, a Ford distributor selling crash parts to FLM is acting as a wholesaler and not as a retailer. If anything, FLM is higher on the distributive chain than the independent repair shop. Accordingly, if Ford's wholesale incentive plan were a valid functional discount and not an attempt by Ford to prevent independent dealers from dealing in crash parts, then at the very least, a franchised dealer would be entitled to the same wholesale incentive allowance on the sale of crash parts to FLM as it receives on the sale of crash parts directly to independent repair shops.

Ford's wholesale incentive plan which charges its franchised dealers 25 percent more for sales to FLM than for sales to independent repair shops has turned upside down what is commonly known

as the "functional discount" which the Court of Appeals was compelled to admit provides for lower prices to those higher up on the distributive chain.

Similarly, the Court of Appeals' references to the fact that Ford undertook its wholesale incentive allowance program on crash parts at the behest of the Federal Trade Commission in an attempt to somehow give the impression that the Federal Trade Commission has approved Ford's wholesale incentive allowance in its present form is misleading. The Federal Trade Commission has made it clear that:

> "The Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him." 16 CFR 15.333.

Also incomprehensible is the Court of Appeals' distinguishing of F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), which has always been understood to stand for the simple proposition that:

> "* * * a price discrimination within the meaning of (§2(a)) is merely a price difference."

on the ground that Anheuser-Busch was a primary line territorial price discrimination case. This is a distinction without a difference. That a price discrimination is simply a price difference has been accepted as the standard definition of price discrimination by the various courts of appeals following Anheuser-Busch and in situations not dealing with primary line cases. See, e.g., Hampton v. Graff Vending Company, 478 F.2d 527, 532 (5th Cir. 1973).

Prior to Anheuser-Busch, price discrimination had likewise been defined as a difference in price or the selling of the same kind of goods cheaper to one person than to another. See, e.g., F.T.C. v. Cement Institute, 333 U.S. 683, 721 (1948).

The Court of Appeals' decision below is also the first time that anyone has attempted to cite F.T.C. v. Borden Co., 383 U.S. 637 (1966), for the proposition that a supplier may sell the same product to different purchasers for different prices. The sole question in Borden was whether or not evaporated milk of the same grade and quality sold under the Borden label and at the same time sold under private brand labels must be construed as being of "like grade and quality" for purposes of the Robinson-Patman Act or whether service and market

acceptance of the Borden label constitutes a difference in product for purposes of the Robinson-Patman Act.

The Court in Borden found that if both the private label and the Borden label milk were made available to all, then there would be no price discrimination since any purchaser could buy either label it desired at the same price as any other purchaser.

This Court has never before been construed as having held in Borden that a supplier may charge its customers two greatly varying prices, e.g., 25 percent more for the exact same crash part, depending solely upon whom Ford's customers resold those crash parts to.

The Court of Appeals in a superficial fashion and in no way even attempt-

ing to distinguish the careful analysis set forth in the district court's decision (406 F.Supp. 224), found that the Robinson-Patman Act had not been violated simply because Ford charged all of its franchised dealers the same price depending upon whom they resold crash parts to, thus totally ignoring the real basis and purpose of the Robinson-Patman Act which is that the price for which goods are sold may not be contingent upon who the purchaser is, but only upon the fact that the same price must be charged to all unless the price difference is cost justified.

If this Court does not grant certiorari and reverse the decision of the Second Circuit, in essence, the law in the Second Circuit will be directly contrary to what this Court said it is in Perkins and the Robinson-Patman Act

will become a mockery in the Second Circuit which could be avoided by the simple expedient of adding a level to the chain of distribution and then discriminating in price between purchasers of the exact same product. If the Robinson-Patman Act is to be repealed, it is for Congress to do so, not for the Second Circuit to construe the Act in a fashion directly contrary to this Court's mandate in F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968), that the Act should not be construed:

> "in a manner which runs counter to the broad goals which Congress intended it to effectuate." 390 U.S. at 349.

The Second Circuit's decision if permitted to stand not only runs counter to the broad goals which Congress set forth for the Robinson-Patman Act, but

turns the Robinson-Patman Act into a toothless tiger which can be evaded by the simplest subterfuge of having an intermediate level of distribution.

2. The Second Circuit's Finding that Ford's Wholesale Incentive Plan Does Not Violate Section 1 of the Sherman Act and the Doctrine Set Out in United States v. Arnold, Schwinn & Co. is Directly Contrary to the Holdings of the Fifth and Eighth Circuits.

The Second Circuit in affirming the dismissal of FLM's claim under Section 1 of the Sherman Act held that Ford's wholesale incentive plan did not violate Section 1 of the Sherman Act under the doctrine of United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), because there was not:

> "a contract, combination--or conspiracy between Ford and its

> dealers. * * * Ford unilaterally established its prices to its dealers and did not fix their resale prices or terms." (a-24)

The Second Circuit's position is directly contrary to this Court's mandate in Schwinn and directly contradicts the position taken by the Eighth Circuit in Reed Brothers, Inc. v. Monsanto Company, 525 F.2d 486 (8th Cir. 1975), cert. den., 96 S.Ct. 787 (1976), and by the Fifth Circuit in Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976).

This Court in Schwinn stated:

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred--whether by explicit agreement or by silent combination or understanding with his vendee--is a per se violation of § 1 of the Sherman Act." 388 U.S. at 382 (emphasis supplied)

In our case, Ford after admittedly parting with title and risk to crash parts restricted the persons to whom the crash parts could be transferred by charging franchised dealers 25 percent more if they sold crash parts to FLM rather than directly to independent repair shops.

In Reed Brothers, supra, Monsanto adopted basically the same plan that Ford did in order to prevent independent distributors from dealing in its product. Monsanto offered its dealers a rebate on sales which it made directly to retailers. The plaintiff, an independent distributor of Monsanto's products was thus no longer able to compete in the sale of Monsanto herbicide products. The Eighth Circuit held that no formal agreement among Monsanto and its distributors was necessary and that its rebate program was a cooperative one sufficient

to constitute a contract, combination or conspiracy under Section 1 of the Sherman Act, since in order for the rebate program to work, it required the cooperation of both Monsanto and its distributors.

Similarly, in Response of Carolina, supra, the defendant franchised the sale of computer time-sharing services. The agreement provided that a franchisee was to pay the defendant 15 percent of its sales to customers within its area and 70 percent to customers outside its area. The Fifth Circuit held that the radical increase in royalty payments for sales made outside of the area in fact resulted in the imposition of a restriction upon the persons and territory in which a franchisee could sell computer time, 537 F.2d at 1319. Again, the Court found after an extensive discussion that

no formal agreement was necessary for there to be a violation of Section 1 of the Sherman Act.

The Second Circuit's finding that there was no agreement in our case between Ford and its distributors sufficient to constitute a combination or conspiracy in violation of Section 1 of the Sherman Act is directly contrary to this Court's decision in Albrecht v. Herald Company, 390 U.S. 145 (1968) where this Court clearly held that where a supplier compels distributors to adhere to a policy and enforces that policy, a combination in violation of Section 1 of the Sherman Act has occurred.

Even those cases like Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d. Cir.), cert. den., 393 U.S. 938

(1968), which placed a gloss upon Schwinn to the extent of reading Schwinn to require that the supplier be firm and resolute in obtaining compliance with its policy before a violation of Section 1 of the Sherman Act would occur, would still not prevent a violation of Section 1 of the Sherman Act from having occurred in our case. There can be no question that Ford was firm and resolute in enforcing its wholesale incentive policy with its radical price difference depending upon whom its franchised dealers resold crash parts to.

Ford maintained a right to audit all of its franchised dealers and did so on a consistent basis including an audit of FLM on two separate occasions as well as of the franchised Ford dealer who was supplying FLM to insure that its policy

was being firmly complied with. It is clear that Ford's restriction upon its franchised dealers as to whom they could freely sell crash parts to through the means of imposing a radical price difference of 25 percent so as to prevent franchised dealers from selling crash parts to FLM or other independent distributors was a per se violation of Section 1 of the Sherman Act.

Even before Schwinn, this Court made it clear in United States v. General Motors Corp., 384 U.S. 127 (1966), that once a manufacturer has parted with title to its product it cannot prevent its distributors from selling directly to retailers or consumers or choosing to deal through sub-jobbers or sub-distributors if it chose to do so.

Here, Ford's admitted purpose in changing its wholesale incentive policy was to prevent franchised dealers from selling to independent distributors such as FLM if they chose to do so. This is a per se violation of Section 1 of the Sherman Act.

Ford's excuse that this restriction on its franchised dealers as to whom they can deal with makes it easier for Ford to police its own franchised dealers to make certain that they are complying with its policy does not excuse Ford's conduct. This Court in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), cited Schwinn and stated:

> "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." 410 U.S. at 380.

If the Court of Appeals decision in this case is permitted to stand, then the entire Schwinn doctrine would become a nullity. Ford or any other manufacturer would no longer have to place a customer or territorial restriction upon its franchised dealers. It could simply obviate Schwinn by charging its dealers a radically higher price as Ford is doing in our case if the dealer resells the goods outside of its territory or to a customer other than that chosen by the supplier. Schwinn cannot be so easily avoided. In enforcing the antitrust laws, the courts must look at the arrangement as it operates in practice rather than the veneer given to an arrangement by skillful drafting. Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964).

The Eighth Circuit in Reed Brothers, supra, and the Fifth Circuit in Response of Carolina, supra, recognized that similar arrangements to that utilized by Ford were merely subterfuges to avoid Schwinn and found that they were violative of Section 1 of the Sherman Act.

The Second Circuit's decision in our case is in direct conflict with the Eighth and Fifth Circuits and is likewise contrary to this Court's decisions in Schwinn and General Motors, and if the Second Circuit's decision in this case is not reversed, suppliers will be able to avoid Section 1 of the Sherman Act with impunity in the Second Circuit.

Conclusion

A Writ of Certiorari should issue and the order of the Second Circuit should be reversed.

Respectfully submitted,

Julien & Schlesinger, P.C.

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A P P E N D I X

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-six

Present: HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
HON. MURRAY I. GURFEIN,
Circuit Judges

FLM Collision Parts, Inc.,
Plaintiff-Appellee-Cross-Appellant,

v.

Ford Motor Company & Ford Marketing Corp.,
Defendants-Appellants-Cross-Appellees.

A petition for a rehearing having been filed herein by counsel for the

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-six.

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FLM Collision Parts, Inc.,
Plaintiff-Appellee-Cross-Appellant,

v.

Ford Motor Company and Fort Marketing Corp.,
Defendants-Appellants-Cross-Appellees.

-------------------------------------x

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Plaintiff-Appellee-

Cross-Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1192, 1260—September Term, 1975.

(Argued June 16, 1976   Decided September 30, 1976.)

Docket Nos. 76-7161, 76-7202

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

Before:

MANSFIELD, OAKES and GURFEIN,

Circuit Judges.

Appeal and cross-appeal from a decision and judgment entered after a non-jury trial in the United States District Court for the Southern District of New York, by Thomas P. Griesa, *Judge,* finding that Ford's allowance of certain discounts on automobile parts constituted price discrimination in violation of §2(a) of the Robinson-Patman Act, dismissing Sherman Act claims based on the same discount system, and awarding plaintiff treble damages, attorneys' fees and injunctive relief. *See* 406 F.Supp. 224.

Judgment on the Robinson-Patman claim reversed. Dismissal of Sherman Act claims affirmed.

ROBERT MACCRATE, Esq. (William M. Dallas, Jr., Esq., Sullivan & Cromwell, 48 Wall Street, New York, N.Y.)

—and—

STANLEY D. ROBINSON, Esq. (Michael Malina, Esq., Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, N.Y. 10022)

—and—

WILLIAM A. ZOLBERT, Esq. (Office of General Counsel, Ford Motor Company, of counsel), *for Appellants.*

DAVID JAROSLAWICZ, Esq. (Alfred S. Julien, Esq., Stuart A. Schlesinger, Esq., Julien & Schlesinger, P.C., 2 Lafayette Street, New York, N.Y., David L. Wasser, Esq., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

In this civil anti-trust suit for damages in the Southern District of New York by FLM Collision Parts, Inc. an independent wholesaler of automobile parts, against Ford Motor Co. and its wholly owned subsidiary, Ford Marketing Corporation (herein collectively referred to as "Ford"), the subject of attack is a Ford incentive allowance plan under which Ford grants to each of its franchised dealers a discount on the dealer's purchases of "crash parts" for resale to independent automobile repair shops but not on the dealer's purchases for its own use or for resale to

other classes of customers, including FLM. FLM claims that this pricing practice amounts to a price discrimination in violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a), and also constitutes a conspiracy in restraint of trade violative of §1 of the Sherman Antitrust Act, 15 U.S.C. §1, and a monopolization of the market in violation of §2 of the Sherman Act, 15 U.S.C. §2.

After trial of the action before Thomas P. Griesa, *Judge*, sitting without a jury, he handed down an opinion, reported at 406 F.Supp. 224, agreeing with FLM that the incentive payment plan was a form of price discrimination and thus a violation of §2(a) of the Robinson-Patman Act. He dismissed FLM's Sherman Act claims, however, finding that the plaintiff had failed to prove its allegations of conspiracy and monopolization. A supplemental opinion awarded FLM treble damages of $874,506, $135,000 in attorneys' fees, and injunctive relief. Ford appeals from this judgment, and FLM cross-appeals from the dismissal of its Sherman Act claims. We hold that the district judge erred in finding price discrimination in violation of §2(a), since Ford's incentive plan treated all of its purchasers equally, and accordingly we reverse the judgment in favor of FLM. We affirm the dismissal of the Sherman Act claims.

The Facts

"Crash parts", as the name indicates, are fenders, grills, and other sheet metal parts used principally to repair automobiles damaged in collisions. They are custom-designed for particular years and models of automobiles, and Ford is the sole source of such parts for Ford cars. The distribution system of the parts thus begins with Ford, which makes some parts itself and licenses the manufacture of other parts. Ford sells its crash parts

exclusively to its franchised Ford dealers, of which there are some 6800 in the United States. The dealers use some of the parts in their own repair shop operations, in effect selling them directly to the car owner and to this extent functioning as retailers. With respect to the balance the Ford dealers function as wholesalers, reselling the parts to independent auto repair shops for use in those shops' repair operations and to other users such as owners of large fleets of automobiles and insurance companies.

FLM entered the crash parts business in 1965 as an independent wholesaler. Its request to buy crash parts directly from Ford was refused, since Ford sold parts only to its franchised Ford dealers. FLM then made arrangements to buy Ford parts from a franchised Ford dealer, Central Lincoln Mercury Corp. ("Central"). The FLM-Central agreement allowed FLM to buy the parts at 2% above the price Central paid Ford for them. FLM then in turn resold the parts to independent repair shops.

Prior to 1968, Ford priced its crash parts to its franchised dealers at approximately 60% of Ford's suggested list price.[1] Thus, a part retailing at $10.00 would be sold by Ford to its dealers, including Central, at $6.00, which was described as the "dealer net" price (i.e., 40% off the suggested list price). Central would resell the part to FLM at $6.12. (Dealer net plus 2%). While FLM was thus at a slight price disadvantage in competing with Ford dealers for sales of crash parts to independent repair shops, its sales grew from $245,738 in the fiscal year ending Sept. 30, 1966 to $389,987 in the fiscal year ending Sept. 30, 1968. However, FLM did not show any net profit over this period.

1 Until 1968 the price was 58% of the suggested list price; in 1968 this was changed to 60%. We use the 60% figure throughout for ease in computing the examples given.

Putting FLM to one side for the moment, Ford's pre-1968 distribution system for crash parts clearly put independent auto repair shops at a disadvantage in competing with Ford-franchised dealers for repair jobs on Ford cars. This arose from the fact that while Ford dealers could buy the parts needed for such repairs from Ford at the "dealer net" price (e.g., $6.00 for a part with a $10.00 suggested retail) the independent repair shops had to buy the same part from a Ford dealer at dealer net plus whatever markup the Ford dealer might choose to add. Thus, if a Ford dealer charged a 10% markup on the parts it resold, an independent repair shop would have to pay $6.60 for the part which the Ford dealer could buy for $6.00. This situation attracted the attention of the Federal Trade Commission, which informed Ford that it considered the prices charged to independent repair shops to be an unfair trade practice in violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45. The FTC never began formal proceedings against Ford; the matter was settled when Ford adopted the "wholesale incentive" allowance to dealers which was designed to equalize the prices at which independent repair shops could obtain Ford parts with the prices paid by Ford dealers for the same parts.[2]

Under the wholesale incentive plan Ford sold crash parts to its dealers at lower prices when they were resold to independent auto repair shops than when they were retained by the Ford dealer for use in his own repair operations. For a part having a $10.00 suggested retail list price the Ford dealer would still pay $6.00 when he bought it for

2 The parties dispute the part the FTC played in the development of the incentive plan, with Ford suggesting that the FTC played a major role in the adoption of the plan, and FLM arguing that the FTC accepted the plan only reluctantly. As might be expected, the record seems to indicate that the truth falls somewhere in between; it appears that the plan was Ford's idea, but the FTC found it acceptable.

use in his own repair shop. However, when he bought it for resale to an independent repair shop he would receive back from Ford an incentive allowance of 20% of the dealer net price, reducing the Ford dealer's bottom line price to $4.80 (dealer net of $6.00 less 20%).[3] Thus, under the plan the independent repair shop would be able to buy the part at $4.80 plus the Ford dealer's markup, which allowed him to compete effectively for repair business with the Ford dealer who would have a dealer net cost of $6.00 for the same part when retained for use in his repair operations.

The incentive payment plan as originally adopted in 1968 allowed sales of crash parts by Ford dealers to independent wholesalers to qualify for the incentive payments to the dealers. Central, which now charged FLM a 3% markup over dealer net on crash parts, simply paid over to FLM the incentive payments it received on parts sold to FLM. Thus FLM's cost for the part with a $10.00 suggested retail price was now $4.68. [$6.00 dealer net plus $.18 (Central's 3% markup) less $1.20 (the 20% incentive payment)]. However, the objective of the incentive plan, which was to reduce prices to independent repair shops, was not initially achieved, principally because neither Ford dealers nor FLM made any appreciable reduction in their resale prices to such shops. The principal effect of the flow-through of the incentive payments to FLM was to increase its profitability dramatically; from a net loss of $769 in fiscal 1968 FLM leaped to a net profit of $25,418 in fiscal 1969, and enjoyed similar profits in the next three years. Thus FLM rather than the independent repair shops became a principal beneficiary of the plan.

Beginning in 1969, the amounts Ford paid out in wholesale incentive allowances on crash parts, and on other types of parts for which it made similar incentive payments, ran

3 The incentive payment was increased to 25% in 1970.

higher than expected. Worried that Ford dealers might be claiming incentive allowances to which they were not entitled, Ford audited the accounts of 37 dealers whose claims for incentive payments ran especially high. Central was one of the dealers selected for an audit; Ford examined its books and those of FLM as well. While the audit of Central and FLM disclosed some improper claims, they were insubstantial in amount, and Ford concedes that this audit and a similar one made in 1970 showed that Central and FLM were complying with the terms of the incentive program.

While Central and FLM may not have been engaged in any improper use of the incentive plan, the same could not be said of all of Ford's dealers. Ford's statistical analysis of the overall results of the 37 audits conducted in 1969 indicated that as much as $2.1 million of the $44.5 million in incentive payments claimed might be improper. Among other things, some dealers were selling parts to wholesale intermediaries and then claiming an incentive allowance for doing so, even though the wholesaler then resold the part to another Ford-franchised dealer. As a result of the audit, Ford began considering ways to alter the incentive payment plan to avoid the use of such tactics. In July 1971, it promulgated a revised version of its incentive plan, under which Ford dealers would be eligible for the payment only when they resold parts to an independent repair shop, not when they resold them to wholesalers such as FLM or to other classes of customers, such as fleet owners and insurance companies. It is this revision of the plan which is at the heart of the present suit.[4]

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4 Another aspect of the evidence is the fact that in 1971 Ford withdrew a special dealer code number which it had issued to Central, and which FLM used for direct billing on parts it purchased. We mention this only for the sake of completeness, since it is peripheral to the issues raised on this appeal.

Despite the fact that the revised version of the incentive plan would not allow incentive payments on parts resold to wholesalers such as FLM, Atlas Lincoln Mercury, ("Atlas"), the corporate successor to Central, continued to claim incentive allowances on parts it resold to FLM under the same arrangements as the latter had with Central. This continued through mid-1972 when Ford discovered that the payments were being claimed for sales to FLM and proposed to recover from Atlas some $24,000 in payments made to Atlas on account of its sales to FLM. Atlas then withheld its payments of incentive allowances over to FLM, which retaliated by withholding monies due to Atlas. In the end, though Ford refused to allow any further incentive payments to Atlas on account of sales to FLM, it agreed not to recoup the past payments to Atlas. Atlas and FLM ceased doing business together.

Since 1972, FLM has purchased crash parts from other Ford dealers, paying them 5% above dealer net cost. Under the present system, a Ford dealer selling a part to FLM will receive no incentive payment on it. Thus, a $10.00 retail part resold to FLM will cost the dealer $6.00 [the dealer net price], and FLM a total of $6.30, including the Ford dealer's 5% markup. When, however, the part is resold to an independent repair shop, it will cost the Ford dealer only $4.50 [the dealer net price, less the incentive payment, which was raised to 25% in 1970]. The difference between the cost to FLM and the cost to the Ford dealers has put FLM under pressure in the competition for resales to independent repair shops. While FLM's net sales for fiscal 1973 rose over its 1972 sales, it experienced a net loss of $85,707 for the 1973 year, as compared to a $21,091 profit the year before. Preliminary estimates introduced at trial indicated that during fiscal 1974, FLM's sales fell to $694,000, some $100,000 less than in 1973.

Discussion

The Robinson-Patman Claim

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part that:

> "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . ." 15 U.S.C. §13(a).

The district judge concluded that Ford's incentive payment plan as it functioned after the 1971 change violated the Act's prohibition of price discrimination, stating:

> "It is not disputed that, since November 1972, Ford has charged to Ford dealers who sell to FLM a higher price than Ford charges for the same crash parts when a Ford dealer sells directly to an independent body shop. Putting aside for the moment the question of the purpose of Ford's price differentials, it would appear at least that the basic elements of a Section 2(a) violation are out. Ford charges different prices to different purchasers—Ford dealers—for the same crash parts." 406 F. Supp. at 236.

We disagree with this conclusion. The district court's holding runs contrary to the plain language of the Act, which limits its prohibition to price discrimination "between different purchasers." The statute thus proclaims in substance that a seller must extend equality of treatment to its competing purchasers and may not discriminate in price between them. However, it does not prohibit the seller from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler,

provided all competing purchasers are treated equally. In this case Ford, the seller, treated all of its purchasers (franchised dealers) equally, offering each the same prices as those offered to every one of its other dealers. Hence Ford's incentive payment plan did not discriminate against any of its purchasing dealers. All Ford dealers could receive the incentive payments resulting in lower prices for parts they resold to independent repair shops, and all were denied these payments when the parts were not so resold. For instance, FLM's suppliers, Central or Atlas, are entitled to the incentive payments from Ford when they resell its crash parts to independent auto repair shops, and there is no indication that under its amended plan Ford allows the incentive payments to any Ford dealers for resale of parts to customers (such as FLM) who are not independent auto repair shops. In short, while the incentive payment plan did not set a single uniform price for all types of sales made by Ford to its dealers, it was administered with an even hand, without any discrimination among the dealers who purchased from Ford.

Relying on *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968); and *Mueller Co.* v. *FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), FLM argues that §2(a) obligates Ford to charge one uniform price to each of its customers and that dual pricing, even though equally available to all, is discriminatory. We disagree and fail to find support for such a rule in these or any other authorities. The statement quoted from the Court's opinion in *Anheuser-Busch* to the effect that "a price discrimination within the meaning of [§2(a)] is merely a price difference" is taken out of an entirely different and distinguishable context, which renders it wholly inapplicable to this case. There the court was dealing with a claim of primary-line territorial price discrimination under

which Anheuser granted lower prices to dealers in the St. Louis area, but not to those located elsewhere, for the purpose of driving out competition. The court's quoted comment was in response to Anheuser's argument that the FTC was obligated to prove that the lower prices to the St. Louis customers were below cost or unreasonably low and were subsidized by the higher prices charged to others. *See id.*, at 548-49. No such charge or situation exists here; Ford makes the same prices available to all its customers.

Were there any doubt about the matter, the Supreme Court's later decision in *FTC* v. *Borden Co.*, 383 U.S. 637 (1966), makes it clear that the language in *Anheuser-Busch* does not imply that the Robinson-Patman Act requires the uniform pricing rigidity FLM here asks but, on the contrary, permits a seller to offer dual prices to its customers on an equal basis. Although the Borden Company there charged purchasers a higher price for its brand-name milk than it charged for private label brands "of like grade and quality" within the meaning of Section 2(a), the court remanded the case for a determination of "whether the differential under attack is discriminatory within the meaning of the Act," and of whether Borden had established any of the statutory defenses. *Id.* at 646. Thus it was recognized that the difference in price would not fall under the Act's ban on price discrimination if all purchasers were given an equal opportunity to purchase the less expensive milk. *See id.* at 641 n. 4; 643.[5] In his dissent on the "like grade and quality" issue, Justice Stewart further underlined the point that the Act requires only equal treatment of all purchasers, not a single unvarying price:

5 On the remand, the Court of Appeals set aside the FTC's cease and desist order against Borden on various grounds, including that the private brand milk had been sold to any customer who asked for it. *See* *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967).

> [T]he existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under §2(a) is reached. Nothing in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. *So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimination within the meaning of §2(a) can be made out.*" *Id.* at 659 n. 17 (emphasis added).

Thus, even when a seller has a dual pricing system, if the lower price is available to all purchasers, not only in theory but in fact, *see FTC* v. *Morton Salt Co.*, 334 U.S. 37, 42 (1948), there is no violation of §2(a).[6]

In short the Act, as its language indicates, requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances. *Cf. Sun Cosmetic Shoppe, Inc.* v. *Elizabeth Arden Sales Corp.*, 178 F.2d 150, 152 (2d Cir. 1949) ("The Act does not undertake to forbid a seller to grant favors to his customers . . . it only insists that the distribution, if any, shall be equal.") This principle has been applied in cases which found no violation of §2(a) in pricing plans which, though varying prices according to different terms

6 *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969), does not cast any doubt on this conclusion. In that case, it was established that the seller had discriminated in price against some of its purchasers; the only question was level of distribution at which the requisite competitive injury could be shown.

of sale, were administered equally to all purchasers. *See Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969) (discounts for advance deposits); *Boss Manufacturing Co.* v. *Payne Glove Co.*, 71 F.2d 768 (8th Cir.), *cert. denied*, 293 U.S. 590 (1934) (dual product lines); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 389 F. Supp. 1334, 1341 (N.D. Cal.) (dictum) (private label breads), *rev'd on other grounds*, 526 F.2d 86 (9th Cir. 1975); F. Rowe, Price Discrimination Under the Robinson-Patman Act 97-98 (1962).

Accepting as we do the Supreme Court's observation in *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968), that the Robinson-Patman Act should not be construed "in a manner which runs counter to the broad goals which Congress intended it to effectuate,"[7] we find nothing in that decision to support FLM's position here and nothing in the present case to indicate that Ford's incentive allowance plan is aimed at defeating or circumventing the Act. In the first place, *Fred Meyer* did not involve §2(a)'s applicability to price adjustments, much less to any of the type challenged here. The question there was whether promotional allowances paid by a manufacturer directly to certain retailers, but not to intervening wholesalers who resold to other competing retailers, violated §2(d) of the Act, 15 U.S.C. §2(d).[8] In holding that the manufacturer

7 While we do not adopt a narrow construction of the Robinson-Patman Act in this case, it should be noted that such a mode of construction of the Act has frequently been advocated. *See, e.g., FTC* v. *Fred Meyer, Inc., supra*, 390 U.S. at 359-60 (Harlan, J., dissenting); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787, 794 (1963).

8 The incentive payments here under attack were not related to any advertising or promotional activities by the Ford dealers who resold the crash parts to independent repair shops; they were merely adjustments to price, and as such, not within the ambit of the stricter prohibitions imposed by §2(d). *See Rutledge* v. *Electric Hose & Rubber Co.*, 511

was required to give the same promotional allowances to retailers purchasing from the wholesalers as those given by it directly to retailers, the Court did not suggest that it intended, by analogy or otherwise, to interpret §2(a) as requiring a manufacturer to equalize prices charged to those performing different functions in the line of distribution. Indeed, to do so, as Justice Harlan's dissent in *Fred Meyer* noted, 390 U.S. at 361, would be to run afoul of the Sherman Act. If, in order to avoid violation of the Robinson-Patman Act, Ford were required to fix the prices at which FLM purchased parts from Ford dealers so that the prices to both would be equalized, Ford would be open to the charge of illegal price fixing.

We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers (whether or not labelled "incentive"), which has the purpose or effect of defeating the objectives of the Act, §2(a)'s language may not be construed to defeat it. But that is quite different from the situation before us. Here the incentive allowance is given by Ford to its dealers in recognition of the fact that in reselling to independent repair shops the dealer acts as a wholesaler rather than a retailer. Although denial of the allowance on resale of parts to others may have the practical effect of placing a floor under the price at which dealers can resell to intermediate wholesalers, the same could be said generally of standard functional discounts, the legality of which is not questioned.

F.2d 668, 678 (9th Cir. 1975); *Kirby* v. *P.R. Mallory & Co.*, 489 F.2d 904 (9th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974). It is true that in some instances the word "customer" in §2(d) and the word "purchaser" in §2(a), are to be given the same meaning, *see, e.g., American News Co.* v. *F.T.C., supra*, 300 F.2d at 109, but the Supreme Court limited its holding in *Fred Meyer, Inc.* (that a manufacturer was required to give the same promotional allowances to retailers purchasing from wholesalers as to retailers buying directly from him) to §2(d) cases. *See* 390 U.S. at 348-52.

See Rowe, Price Discrimination Under the Robinson-Patman Act 173-174 (1962); Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act,* 60 Harv. L. Rev. 571 (1947); Doubleday and Co., Inc., 52 F.T.C. 169, 207-208 (1955).

The record furthermore fails to provide the basis for an inference that Ford's incentive payment plan has been simply a device to achieve indirectly a price discrimination forbidden by the Act. The original plan was adopted in response to the FTC's concern that independent auto repair shops be permitted to obtain crash parts at prices that would enable them to compete with Ford dealers in the repair business. The revision of the plan of which FLM complains came after Ford's audits disclosed that under similar incentive plans involving other types of automobile parts[9] dealers were, in effect, selling to each other through the medium of outside wholesalers, thus allowing Ford dealers to obtain the parts at the same price or less than independent shops and undercutting the objective of the plan. While FLM was not involved in such dealings, its position as an intermediary raised the possibility of this problem.[10] In these circumstances, it was not unreasonable for Ford to make a general change in its incentive plans, both those in which such difficulties had arisen, and the crash parts plan, where they were posed as a potential problem. Thus the record indicates that the 1971 revision of the plan was an attempt to further implement Ford's original intention of funnelling crash parts at reasonable

9 While a limited amount of evidence was presented dealing with these other incentive plans, their structure appears to be essentially the same as that of the crash parts plan.

10 We cannot fathom the trial judge's contrary conclusion that FLM was not even "potentially" such an intermediary between Ford dealers. We see no evidence of any aspect of FLM's operations which would assure against such dealings.

prices to independent repair shops so as to improve competition in the auto repair business, and was not a device to circumvent the Act.

Nor do we find support for FLM's contention in *Mueller Co.* v. *FTC,* 323 F.2d 44 (7th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964). There the seller had divided its purchasers into two classes—regular and "stocking" jobbers. It granted an extra 10% discount to stocking jobbers to compensate them for their expenses in maintaining warehouse stocks of the seller's product. However, not all jobbers were able to become stocking jobbers and thus take advantage of the 10% discount. Specifically the FTC found that the seller "discriminated in the selection of stocking jobbers." *Id.* at 45. In affirming the FTC's finding on this point, and rejecting the petitioner's argument that there was no price discrimination since all jobbers could become stocking jobbers, the Seventh Circuit stated that:

> "There were no objective standards to guide regular jobbers in qualifying as acceptable and there is substantial evidence to support the Commission's finding as well as evidence that petitioner's decisions on this point were influenced by whether it had already adequate distribution 'in that particular area' and by its concern to protect 'old established jobbers.' Theoretically, these discounts were available to all, but functionally they were not." 323 F.2d at 46. (Citation omitted)

Thus the gravamen of the discrimination found in *Mueller* was not the provision of the 10% discount to jobbers as compensation for their wholesaling services, but rather the fact that eligibility to enter this favored class was only selectively recognized and not made equally available to all jobbers. Here, in contrast, Ford did not arbitrarily

select some of its dealers and limit incentive payments to them. Rather, such payments were available to all Ford dealers purchasing from Ford. *Mueller* thus simply reaffirms the principle that treatment of purchasers must be even-handed. Having treated its dealers equally here, Ford fulfilled its duties under the Act.

We need not dwell at length on FLM's alternative suggestion—understandably brief—that it should be treated as an "indirect purchaser" from Ford and thus entitled to the same prices as those charged by Ford to its dealers. The "indirect purchaser" doctrine originated in *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937), as a means of preventing a manufacturer from insulating itself from Robinson-Patman liability by using a "dummy" wholesaler to make sales at terms actually controlled by the manufacturer. *See American News Co. v. FTC*, 300 F.2d 104, 109-10 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); F. Rowe, *supra*, at 57-59. The doctrine comes into play when the manufacturer "deals directly with the retailer and controls the terms upon which he buys." *American News Co., supra*, 300 F.2d at 109; *see K.S. Corp. v. Chemstrand Corp.*, 198 F.Supp. 310 (S.D.N.Y. 1961); *Kraft-Phenix Cheese Corp., supra*.

Ford's direct dealings with FLM were at best fragmentary,[11] and the company did not attempt through the medium of a suggested price or otherwise to set the prices at which its dealers would sell crash parts to FLM. The most that can be said is that as a practical matter Ford's wholesale price to its dealers serves as a floor for their resale prices. As Judge Griesa noted, *see* 406 F. Supp. at 241, to equate this with the "control" required by *American News Co., supra*, would reach the absurd result of extending the doctrine to cover every resale of goods. The "indirect purchaser" doctrine, therefore, has no application to this case. If Congress desired to bar a manufacturer from granting functional discounts that might affect its wholesaler's resale policies, further legislation would be required. Under the Act as it stands the manufacturer is free to grant such discounts on an equally available basis to all of its customers, even though the effect may be to limit the development of additional layers of intermediaries which might occur if the discount or allowance were not limited to the performance of a specific type of wholesaler function in the line of distribution.

In view of our conclusion that Ford did not engage in price discrimination, it becomes unnecessary to resolve the other contentions raised by the parties, including whether FLM would have standing to litigate such a claim, whether the incentive plan was injurious to competition, and whether damages were properly proven.

Sherman Act Claims

Turning to the district court's dismissal of FLM's claims based on §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, from which FLM appeals, the §1 claim appears to mix, rather unclearly, two somewhat different theories: first, that the incentive system was the product of a conspiracy between Ford and its dealers to drive FLM out of business, and second, that even if the incentive system was adopted by Ford on its own initiative it is nonetheless a per se violation of §1 under the doctrine of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). FLM's §2 claim asserts that Ford, having a monopoly over the manufacture of Ford crash parts, was attempting to extend that monopoly to the wholesale market. Judge Griesa

11 The only direct dealings appear to be Ford's delivery of parts directly to FLM when the latter was buying them through Central and using a dealer number assigned to Central, and the audits of FLM, to which it consented.

found that FLM had not proved the existence of any conspiracy between Ford and its dealers (or between Ford Motor Co. and its wholly-owned subsidiary, Ford Marketing Corp.), and that since FLM had failed to establish that Ford was vertically integrated into the wholesale market for Ford crash parts no basis existed for charging that it had extended its monopoly power at the manufacturing level into that market in violation of §2.

Since the question of whether the incentive allowance plan and its 1971 amendment to FLM's disadvantage was the product of a conspiracy between Ford and its dealers to drive FLM out of business or to fix the prices of parts sold to it is essentially one of fact, *see Taxi Weekly, Inc.* v. *Metropolitan Taxicab Board of Trade, Inc.*, (Dkt. Nos. 76-7042, 76-7175) (2d Cir. July 13, 1976), *slip opin.* 4925, 4931; *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, (Dkt. Nos. 75-7332, 75-7593, 75-7594, 75-7598) (2d Cir. April 21, 1976), *slip opin.* 3333, 3344, the scope of our review of the trial judge's finding on this issue is limited, Fed. R. Civ. P. 52(a). Faced with a record containing conflicting proof, we cannot say that the trial judge clearly erred in finding that FLM had failed to prove a conspiracy between Ford and its dealers to eliminate FLM or to fix resale prices to it.[12] There was evidence, to which we have alluded, that Ford changed the incentive plan on its own initiative in order to avoid abuses of the system which would undercut its effectiveness in giving independent auto repair shops a chance to compete with Ford dealers. Moreover, FLM concedes that, after the change in the incentive

12 The record discloses nothing even vaguely resembling the course of conduct, including extensive policing efforts and threats of physical violence to dealers, which led the Supreme Court to conclude that a "classic conspiracy in restraint of trade" had been shown in *United States* v. *General Motors Corp.*, 384 U.S. 127, 140 (1966), on which FLM relies.

plan, Ford dealers continued to do business with it, albeit on less favorable terms, which tends to undercut the possibility of such a conspiracy.

We also agree with Judge Griesa, for the reasons he stated, *see* 406 F. Supp. at 245, that FLM did not prove a conspiracy between Ford Motor Co., and its subsidiary; we can only regard as frivolous FLM's argument that Ford is estopped from denying such a conspiracy existed by virtue of certain comments in the charge in *Rea* v. *Ford Motor Co.*, 355 F. Supp. 842, 864 (W.D. Pa. 1973), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).

Nor do we read the Supreme Court's decision in *United States* v. *Arnold Schwinn & Co., supra*, as providing a basis for holding Ford's pricing system *per se* illegal under §1 of the Sherman Act on the ground that it enables Ford, after parting with title to the crash parts, to fix the prices at which dealers will resell the parts to FLM or to stop them from dealing with FLM. *Schwinn* did not do away with an essential element of §1 which was here found lacking—"a contract, combination—or conspiracy," between Ford and its dealers. There the existence of such an agreement was undisputed, and the Court was careful to note that an "explicit agreement or . . . silent combination or understanding" restricting the persons to whom the goods might be resold was an essential condition of a *per se* violation. 388 U.S. at 382; *cf. Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374, 1380-81 (Ct. Cl. 1971); *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-9 (2d Cir. 1975). Here no such understanding existed. Ford unilaterally established its prices to its dealers and did not fix their resale prices or terms. Although the dealers would be most unlikely as a practical matter to resell

below cost, they were free to, and some did, resell to FLM at prices close to their cost. To hold that Ford's establishment of a discount level based on the wholesaler's function in reselling a Ford product violates §1 of the Sherman Act because of its effect on the wholesaler's resale practices would not only ignore the language of §1 but in effect require that all functional discounts be outlawed. We do not find any support for such a holding in §1 or elsewhere.

FLM's §2 claim also suffers from a failure of proof. Where the defendant is charged with monopolization, its possession of monopoly power in the relevant market must be demonstrated, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 422-32 (2d Cir. 1945), which requires proof of the approximate share of that market controlled by the defendant. *See Note, Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum. L. Rev. 1451, 1459 (1973). Where the defendant is charged with an attempt to monopolize, a "dangerous probability" of success must be shown. *E.g.*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153 (1951); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Kreager* v. *General Electric Co.*, 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974). *But see Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

Here the only relevant market which FLM attempted to define was the wholesale market in Ford crash parts. However, FLM failed completely to prove that Ford, as distinguished from its dealers, had any significant share of that market, much less that it was using its monopoly at the manufacturing level to extend such a share. Cases such as *Eastman Kodak Co.* v. *Southern Photo Materials*

Co., 273 U.S. 359 (1972), where the manufacturer sought illegally to use its power as a manufacturer to extend its proven share of the retail market are therefore inapposite and lend no support to FLM's claim. FLM's alternate theory of its §2 claim—that Ford was conspiring with its dealers to help them maintain their shared monopoly of the market—amounts to nothing more than its §1 claim under another name, and its proof on the point is no more impressive when viewed under the rubric of §2.

For the foregoing reasons, we reverse the judgment entered on the Robinson-Patman Act claim, and affirm the dismissal of the Sherman Act claims.

FLM COLLISION PARTS, INC.,
Plaintiff,

v.

FORD MOTOR COMPANY and Ford Marketing Corporation,
Defendants.

No. 73 Civ. 713.

United States District Court,
S. D. New York.

Dec. 19, 1975.

OPINION

GRIESA, District Judge.

This is an antitrust action under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (hereafter referred to as Section 2(a) of the Robinson-Patman Act), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Plaintiff FLM Collision Parts, Inc., is a small company located in Yonkers, New York, and is in the business of dealing in "crash parts" for cars made by defendant Ford Motor Company—*i. e.*, Ford, Mercury and Lincoln cars. Crash parts consist of fenders, grills, panels, and other parts used to repair a car

which has been in an accident or needs replacement of such parts for some other reason.

These crash parts are manufactured only by Ford Motor Company or by other manufacturers who make the parts to Ford's specifications. With certain exceptions not here relevant, these crash parts are sold by Ford [1] only to franchised Ford and Lincoln-Mercury dealers. The franchised dealers [2] either use the crash parts in their own repair work for customers, or resell them to independent repair shops.

The problem in this case arises from the circumstances under which Ford grants a so-called "wholesale incentive" allowance in the sale of crash parts to Ford dealers. Ford grants, or does not grant, the wholesale incentive allowance to the dealers depending on the use they make of the particular parts. If a dealer uses a part in repair work for a customer, this involves a retail sale of the part, and the dealer does not obtain a wholesale incentive allowance on that part. But if a dealer sells the part to an independent repair shop, this involves a wholesale transaction, and the dealer may obtain the wholesale incentive allowance on that part.

1. Ford Marketing Corporation was incorporated in 1970, and commencing in July 1970 was responsible for the marketing of Ford, Mercury and Lincoln automobiles and related products. Prior to July 1970 this marketing function had been performed by the manufacturer, Ford Motor Company. It appears that subsequent to the trial of this action Ford Marketing Corporation was dissolved, and the marketing function was returned to Ford Motor Company. For the purposes of this case, defendants Ford Motor Company and Ford Marketing Corporation will usually be treated as a single entity, and will be referred to as "Ford".

2. For purposes of simplicity, in this opinion I will refer to franchised Ford, Mercury and Lincoln dealers as "Ford dealers".

FLM set itself up to supply Ford crash parts to independent repair shops. At first it sought to buy directly from Ford, but when this request was refused, FLM commenced purchasing crash parts from a Ford dealer in Brooklyn to whom FLM was referred by Ford. FLM then proceeded to sell crash parts, purchased from the Brooklyn dealer, to independent repair shops, mainly in Bronx and Westchester counties.

The wholesale incentive allowance was established by Ford in 1968. Thereafter, until 1972, Ford permitted the Brooklyn Ford dealer to receive the wholesale allowance on parts sold to FLM, which allowance was almost entirely passed on to FLM, thus substantially reducing FLM's costs. Commencing in 1972, Ford refused to grant the wholesale incentive allowance on parts sold to FLM, and restricted the allowance to those parts which were sold by franchised Ford dealers *directly* to independent body shops.

FLM contends in this action that Ford's current pricing policies violate Section 2(a) of the Robinson-Patman Act in two regards: *First*, that Ford, by charging one price to a franchised dealer when it sells to an independent repair shop, and a higher price to a franchised dealer when it sells to FLM, is engaging in unlawful price discrimination in its sales to the franchised dealers, resulting in injury to FLM for which FLM has standing to recover; *second*, that FLM is itself a "purchaser" from Ford—*i. e.*, an "indirect" purchaser—and as such has standing to sue Ford under the Robinson-Patman Act. FLM further contends that Ford has violated Section 1 of the Sherman Act in combining and conspiring with its franchised dealers to injure FLM competitively.

Finally, FLM contends that Ford has violated Section 2 of the Sherman Act in that Ford has monopolized or attempted to monopolize the wholesale market for Ford crash parts. FLM seeks injunctive relief and treble damages.

The case has been tried to the Court without a jury. This opinion constitutes the Court's findings of fact and conclusions of law on the liability phase of the case. The record on damages has not been completed. A supplemental opinion will be issued on the award of damages, including attorneys' fees.

Summary of Conclusions

The following is a summary of my conclusions. I hold that FLM has proved a violation of Section 2(a) of the Robinson-Patman Act based upon the first theory described above—that Ford is engaging in unlawful price discrimination in sales of crash parts to its dealers, resulting in injury to FLM for which FLM has standing to sue. I reject the Robinson-Patman claim of FLM based on the "indirect purchaser" theory. I also reject FLM's claims under both Sections 1 and 2 of the Sherman Act.

Facts

FLM commenced its business in 1965. The two principals of the company are Stephen McKee and John Andidero, both of whom had been employed previously by Ford dealers in parts operations. FLM's first idea was to buy crash parts directly from Ford and sell them to independent repair shops. FLM discussed this with a representative of Ford, but was advised that Ford would only sell its crash parts to franchised dealers. In early 1965 an employee of

Ford in New York City by the name of Joe Collura introduced McKee and Andidero to Central Lincoln Mercury Corp., located in Brooklyn, New York. This led to an arrangement for FLM to buy crash parts from Central at 2% over Central's cost.

At this time there was no wholesale incentive allowance available on crash parts to franchised Ford dealers. The dealers paid the same price—"dealer price"—for crash parts whether they used them in their own repair shops (*i. e.*, made retail sales) or sold them to independent repair shops (made wholesale sales). The "dealer price" was the "suggested list" or retail price, less 42%.[3]

It is useful to examine the effects of the crash parts price structure as it existed at the time FLM commenced business in 1965 until the advent of the wholesale incentive allowance, which was instituted in 1968. Let us assume the sale by Ford of a crash part to a dealer, carrying a suggested list price of $10. The dealer would pay the dealer price of $5.80 *i. e.*, the suggested list price less 42% or $4.20. The Ford dealer could use the part in his own re-

3. It appears that prior to 1968 the amount of the allowance used in calculating the dealer price was 42%, and that commencing in 1968 the amount of this allowance was 40%. There were certain other discounts or allowances granted, under certain circumstances, to dealers in connection with the purchase of crash parts. FLM makes claims for damages based on certain allegations of inability to obtain these allowances. These claims will be discussed in the supplemental opinion regarding damages.

pair operation, and would presumably charge the customer the suggested list price of $10, thus making a gross profit of $4.20. The Ford dealer could also sell the part to an independent repair shop. In such a sale the Ford dealer would presumably make some markup over the dealer cost of $5.80. The inevitable result would be that the Ford dealer and the independent repair shop, both potentially competing for the repair business of Ford owners, would be incurring different costs for the same type of crash part—the dealer paying $5.80, the repair shop $5.80 plus.

To return to the situation of FLM, FLM was buying parts from Central Lincoln Mercury for 2% over dealer price. Using the same $10.00 part as an example, FLM would purchase this part for the dealer cost of $5.80 plus the 2% markup, or a total of $5.92. FLM would be competing with franchised Ford dealers for the business of the independent repair shops. Although there is no explicit testimony about the price which FLM was charging to repair shops in its early years, a reasonable inference from the evidence is that this was suggested retail price less 25%. Applying this percentage to the hypothetical $10.00 part would give the figure of $7.50 as FLM's price to the repair shops, for a part costing it $5.92.

With respect to FLM's competition with Ford dealers for the business of independent repair shops, there is no explicit evidence regarding what prices the dealers were charging to the independent repair shops during this period. However, the reasonable inference is that FLM's prices were at about the same level as the prices charged by the Ford dealers. In any event, FLM was able to compete effectively.

The business of FLM grew steadily. FLM offered certain services to the independent repair shops which the franchised Ford dealers generally did not provide. FLM would visit repair shops, inspect damaged vehicles and advise respecting exactly what parts would be needed to make the proper repairs. FLM carried sufficient inventory so that it could often fill an order the same day it was placed. If FLM did not have a part in its own inventory, it would attempt to procure the part and deliver it no later than the following day. FLM delivered parts to the repair shops, something apparently not done by most of the franchised dealers.

The following figures show the results of FLM's operations commencing with the fiscal year ending September 30, 1966 (the first full year of FLM's operations) through the fiscal year ending September 30, 1968. The latter was the last full year prior to the advent of the wholesale incentive allowance.

Fiscal 1966

Sales	$245,738.00	
Cost of Parts	$201,376.00	
Gross Profit	$44,362.00	(18.1%)
Other Expenses (including officers' salaries of $16,680)	$44,256.00	
Net Operating Profit After Taxes	$80.70	

Fiscal 1967

Sales	$337,257.00	
Cost of Parts	$276,121.00	
Gross Profit	$61,136.00	(18.1%)
Other Expenses (including officers' salaries of $23,520)	$60,927.00	
Net Operating Profit After Taxes	$109.00	

Fiscal 1968

Sales	$389,987.00	
Cost of Parts	$323,959.00	
Gross Profit	$66,028.00	(16.9%)
Other Expenses (including officers' salaries of $26,520)	$65,858.00	
Net Operating Loss After Taxes	-$769.00	

Ford maintained a parts depot at Teterboro, New Jersey. Central Lincoln Mercury provided FLM with an authorization so that FLM could pick up parts at Teterboro. Bills were rendered by Ford to Central, who would then segregate the bills relating to the FLM purchases from the bills relating to other purchases made by Central. In its dealings with Ford, Central was identified by a "dealer code number"—11283.

In order to simplify the accounting for the FLM purchases, Central requested that a separate code number be given by Ford to Central for the parts which it purchased for resale to FLM. Ford agreed to this, and commencing in late 1968, Ford assigned a second code number to Central—13430. This code number was in the name of Central, but the billing address was the address of FLM in Yonkers.

The wholesale incentive allowance for crash parts was instituted in November 1968. At some time prior thereto, the Federal Trade Commission advised Ford that the distribution of crash parts to independent repair shops at higher prices than those charged to franchise dealers for use in the dealers' repair shops violated Section 5 of the Federal Trade Commission Act. No formal proceedings were instituted. The matter

was settled when Ford agreed to allow a discount from dealer's prices for certain classes of crash parts when the franchised dealers resold such parts for use by independent repair shops. The amount of this wholesale incentive allowance on crash parts was initially set at 20%. It applied to some, but not all, crash parts. The record shows that in 1971 there were a total of 10,000 kinds of crash parts sold by Ford, of which about 4,800 were eligible for a wholesale incentive allowance.

The agreement between Ford and the Federal Trade Commission did not expressly provide whether or not a wholesale incentive allowance should be allowed in the event of sales by a Ford dealer to a party such as FLM, acting as middleman between the Ford dealer and the independent repair shop. However, it has been stipulated that from the inception of the wholesale incentive allowance for crash parts until a Ford policy change in mid-1971, a franchised Ford dealer reselling crash parts to FLM was entitled to claim the wholesale incentive allowance on such resales.

In 1968 Ford changed the amount of the discount used to reach the basic dealer price from 42% to 40%. Thus, after 1968, the basic dealer price on a part whose suggested retail price was $10.00 was $6.00 instead of $5.80. In January 1970 Ford increased the wholesale incentive allowance from 20% to 25% for those crash parts to which the allowance applied.

The wholesale incentive allowance was obviously a great benefit to FLM. This is illustrated by returning to our example of the $10.00 crash part. The price paid by FLM's supplier, Central, was $6.00. However, when Central sold this part to FLM, Central received a wholesale incentive allowance equal to 25% (using the post-January 1970 percentage) of the $6.00— or $1.50. Thus Central paid only $4.50 for the part. Following the institution of the wholesale incentive allowance, Central charged FLM a markup of 3% of the basic dealer price—here $6.00. In the example this markup would be 18¢. Thus FLM paid Central $4.68. As already noted, it appears that the wholesale incentive allowance was granted by Ford on only about half the crash parts sold by Ford. Obviously, in the example of the $10.00 part, if the wholesale incentive allowance were not in effect, FLM would pay $6.18.

With regard to FLM's resale prices to the repair shops, and the resale prices of FLM's competitors, the Ford dealers selling directly to the repair shops, there is no explicit evidence in the record as to what such prices were during the time FLM was receiving the benefit of the wholesale incentive allowance. The Federal Trade Commission had contemplated that, following the institution of the wholesale incentive allowance, the Ford dealers would reduce their prices on the covered parts to the same level paid by the Ford dealers when these dealers sold at retail. In the example of the $10.00 part this would be $6.00. The Commission contemplated that, if the Ford dealer obtained a further wholesale incentive discount when the part was sold to independent repair shops, the dealer could afford to resell the part to the repair shops at the $6.00 price.

Apparently there was substantial unwillingness on the part of Ford dealers to reduce the prices charged to the repair shops to the levels contemplated by the Federal Trade Commission. Since the present case does not involve a complaint by an independent repair shop regarding prices charged by a Ford dealer, this issue was not pursued in any depth at the trial.

The only relevance of this matter to the present case is to explain that after the institution of the wholesale incentive allowance for crash parts in 1968, the prices charged by the Ford dealers, at least in FLM's area of competition, do not appear to have been reduced substantially. It appears likewise that FLM did not reduce its prices substantially, and that the principal effect of the wholesale incentive allowance on FLM was to increase its profitability.

The following figures show the profit pictures of FLM after the wholesale incentive discount became effective. Again, the fiscal years refer to years ending September 30.

Fiscal 1969

Sales	$483,015.00	
Cost of Parts	$345,112.00	
Gross Profit	$137,903.00	(28.6%)
Other Expenses (including officers' salaries and commissions of $39,360)	$96,752.00	
Net Profit After Taxes	$25,418.00	

Fiscal 1970

Sales	$620,769.00	
Cost of Parts	$444,865.00	
Gross Profit	$175,904.00	(28.3%)
Other Expenses (including officers' salaries and commissions of $62,700)	$141,106.00	
Net Profit After Taxes	$22,847.00	

Fiscal 1971

Sales	$654,382.00	
Cost of Parts	$448,264.00	
Gross Profit	$206,118.00	(31.5%)
Other Expenses (including officers' salaries of $83,200)	$179,938.00	
Net Profit After Taxes	$18,699.00	

Fiscal 1972

Sales	$736,967.00	
Cost of Parts	$490,347.00 [4]	
Gross Profit	$246,620.00	(33.5%)
Other Expenses (including officers' salaries of $83,200)	$194,232.00	
Net Profit After Taxes	$21,091.00	

It should be noted at this point that Ford markets a wide variety of spare parts other than crash parts. These other parts include spark plugs, filters, carburetors, etc., and are marketed under the Ford brand name and under the brand names "Autolite" and "Motorcraft". Wholesale incentive allowances on the spare parts other than crash parts had been instituted prior to 1968.

The Ford witnesses have testified that commencing in 1969 Ford found that wholesale incentive allowances were running higher than had been estimated. In 1969 the total wholesale incentive allowances granted by Ford for all types of parts amounted to $45.8 million, of which $12.7 million related to crash parts.

Ford was concerned about possible large-scale violations by dealers of Ford's rules regarding the wholesale incentive allowance. Ford's rules prohib-

4. This is a restated figure, deducting from the cost of parts the amount of $621,807.00 wholesale incentive allowance settled in fiscal 1973 and applicable to 1972.

ited, among other things, payment of the allowance on parts sold by one Ford dealer to another Ford dealer either directly or through an intermediary. Ford was concerned about the possibility of one Ford dealer obtaining the allowance for purported use in wholesale sales, and then transferring the parts to another Ford dealer, who would sell them at retail. In this instance, the first Ford dealer would simply be a conduit, and the second Ford dealer would be getting the benefit of the allowance although not making the wholesale sales which the allowance was intended to cover.

Another "abuse" of the wholesale incentive allowance, in Ford's view, was the claiming of the allowance by Ford dealers for parts sold to insurance companies in connection with the repair of cars. Ford regarded these as retail sales, ineligible for the allowance. Still another abuse was claiming the wholesale incentive allowance on parts which had not been purchased from Ford.

In 1969 Ford selected 37 out of its 6700 dealers for audits to determine the validity of the wholesale incentive allowances the selected dealers had claimed. These 37 dealers were ones with unusually high claims for wholesale incentive allowances.

Central Lincoln Mercury, FLM's supplier, was one of the dealers audited. This audit covered not only the records of Central, but also the records of FLM. FLM consented to such an examination. It is conceded by the Ford witnesses that the amount of incorrect wholesale allowance claims involving FLM was "minimal" and that this was a "clean audit." The audit covered the period from November 1968 through September 1969.

The finding of the audit report dated November 21, 1969 was that there were total "discrepancies" of $2,185.23, of which $1,458.34 related to sales to Ford dealers. The balance of the discrepancies related to "return sales not deducted." There were no discrepancies arising from sales to insurance companies or purchases from outside sources. For some reason, the audit report does not disclose the total amount of wholesale incentive allowances claimed with regard to FLM for the November 1968 – September 1969 period, although the audit report states that for the period January through May 1969 the total claims were $24,446. In any event, the amount of the discrepancies was considered minimal as compared with the total claims.

Following the completion of the 37 audits, Ford made a statistical evaluation in order to estimate the overall proportion of improper wholesale allowance claims for all dealers. The estimate was that for the period of the audit there were between $1.2 million and $2.1 million in improper claims out of a total of $44.5 million claims.

In the fall of 1970 there was a second audit of Central and FLM, resulting in an audit report dated November 6, 1970. The audit report stated that the wholesale incentive claims "were tested and found to be generally accurate, properly supported, and submitted in accordance with the provisions of the wholesale parts incentive program." No discrepancies were noted.

During 1970 Ford undertook a reconsideration of the second parts code number which had been issued to Central for use in connection with its sales to FLM. The second code number was discontinued as of the end of January 1971. Central continued to sell to FLM and to obtain the wholesale incentive allowance on sales to FLM until a subsequent time, as will now be described.

In July 1971 Ford amended its rules regarding the wholesale incentive allowance, with the effect that a Ford dealer could not obtain the allowance on parts sold to a party such at FLM. It is this amendment that has given rise to the present action.

Ford asserts that this change regarding the wholesale incentive allowance was the result of three considerations. The first of these was the concern that a party such as FLM might act as an intermediary in transfers of parts between Ford dealers. The second consideration was that a Ford dealer selling to a party such as FLM was not really performing the "wholesale function," but was delegating this function to a middleman such at FLM. The third consideration was that, if Ford dealers were allowed to obtain a wholesale incentive allowance in selling to a party such at FLM, who was acting as a wholesaler, the Ford dealer would not be content with the wholesale allowance, but would demand an even greater allowance—a distributor's allowance.

The only witness at the trial who participated in the discussions of these matters within Ford was Morris J. Rowlands. He testified that he could recall no specific discussion of FLM in connection with the amendment of the wholesale incentive allowance rules

in July 1971. He testified that the discussions were in general terms, in order to arrive at a consistent overall policy applicable to all types of spare parts, including but not limited to crash parts.

Certain facts should be noted with respect to the three considerations described above. As to the first, there was not the slightest indication that FLM was either actually or potentially the kind of intermediary between Ford dealers which Ford was concerned about. It is undisputed that FLM, aside from an occasional sale to a Ford dealer in an emergency, sold its crash parts entirely to independent repair shops. The "discrepancies" found in the 1969 audit were minimal, and in the 1970 audit were nonexistent.

As to the second consideration—Ford's alleged desire to grant the wholesale incentive allowance only where Ford dealers are performing what Ford considers to be the "wholesale function"—this raises a question of law, to be discussed hereafter, as to whether Ford is legally entitled to use the wholesale incentive allowance in such a way as to insure that a Ford dealer sells directly to a retailer rather than selling indirectly through a party such as FLM.

As to the third consideration—Ford's fear that Ford dealers selling to wholesalers would claim a distributor's allowance—Ford admits that, whatever this problem may have been, it related in no way to crash parts or to FLM. Ford's evidence is that it was concerned in this regard about Autolite and Motorcraft, where one channel of distribution involved distributors. Ford allegedly believed that if Ford dealers were encouraged to compete with the distribu-

tors in marketing Autolite and Motorcraft parts to wholesalers, then the Ford dealers would claim a distributor's allowance. Thus Ford was not willing to grant any incentive at all to Ford dealers in order to encourage them to sell these parts to wholesalers.

Ford contends that, although this problem did not relate directly to FLM or to crash parts, Ford desired to have a uniform policy for the wholesale incentive allowance applicable to all types of parts, rather than to have one policy for crash parts and a different policy for Autolite and Motorcraft parts.

I must note here that, even as to the Autolite and Motorcraft parts, there is no showing that any Ford dealers were in fact demanding distributors' allowances for sales of spare parts to wholesalers.

In any event, as already described, Ford's rules were changed in July 1971 to provide that a Ford dealer could obtain the wholesale incentive allowance on parts which were sold directly to independent repair shops, but could not obtain the allowance for parts sold to parties such as FLM, who would resell them to the independent shops.

Although Ford denies that this change of policy was specifically directed to FLM, it should be noted that there was no other company besides FLM who had successfully established a business of acting as middleman between Ford dealers and independent repair shops in the sale of crash parts.

Apparently because of some administrative error on the part of Ford, the July 1971 change of policy was not immediately enforced with regard to sales by Central to FLM. Central continued to sell crash parts to FLM and to receive wholesale incentive allowances on such sales.

In July 1972 the business of Central Lincoln Mercury was taken over by Atlas Lincoln-Mercury. It was agreed between Atlas and FLM that Atlas would make sales to FLM in the same way that Central had done.

At some point in the summer or fall of 1972 Ford awoke to the fact that Atlas was still claiming and receiving wholesale incentive allowances on sales of parts to FLM, contrary to Ford's current policy. Ford approached Atlas and proposed to charge back some $24,000.00 in wholesale incentive allowances which had been paid to Atlas. Atlas argued that FLM was a valuable wholesale account and urged that the wholesale incentive allowance should be continued with respect to sales to FLM. Atlas particularly resisted any chargeback of allowances already paid. These discussions between Ford and Atlas occurred in late October 1972.

During this controversy, Atlas held up certain payments of wholesale incentive allowances to FLM. As a result, FLM held up certain payments which were due to Atlas. Apparently at some point the Ford depot at Teterboro, New Jersey refused to deliver parts to FLM for the account of Atlas.

FLM's attorney approached Ford requesting the continuation of the wholesale incentive allowance on sales to FLM and also complaining about the refusal of the Teterboro depot to deliver parts to FLM. Ford advised FLM's attorney that it would not negotiate directly with a representative of FLM, but would negotiate only with its dealer.

The upshot of these events was as follows. Ford persisted in its refusal to allow the wholesale incentive allowance on parts sold by Atlas, or any other dealer, to FLM. Ford withdrew its claim of charge-back against Atlas. The business relationship between Atlas and FLM was terminated.[5] All this occurred by the end of November 1972.

Subsequently FLM has purchased crash parts from certain Ford dealers without getting the benefit of the wholesale incentive allowance. Commencing in November 1972 FLM purchased parts from Thomas Motors and Parkview Lincoln-Mercury, both of Yonkers, New York. FLM paid Thomas and Parkview 5% over dealer cost. FLM dealt with Thomas Motors until June of 1973, when a new owner of that agency terminated the account. It appears that FLM continues to purchase parts from Parkview Lincoln-Mercury to the present time.

In June 1973 FLM commenced purchasing parts from Pleasantville Ford of Pleasantville, New York. Again, FLM pays Pleasantville 5% over dealer cost. FLM continues to deal with Pleasantville to the present time.

5. FLM contends, not only that Ford withdrew the wholesale incentive allowance, but that Ford directed Atlas to completely cease doing business with FLM. I reject FLM's contention on the latter point. The Ford witnesses deny that any such direction was given, and I credit this denial.

With respect to parts which FLM has purchased from Thomas Motors, Parkview Lincoln-Mercury and Pleasantville Ford, FLM has resold these parts to independent repair shops for 25% off the suggested list or retail price.

The withdrawal of the wholesale incentive allowance had a detrimental effect on FLM's profitability. The financial results for the fiscal year ending September 30, 1973 were as follows:

Fiscal 1973

Sales	$798,947.00	
Cost of Parts	$684,758.00	
Gross Profit	$11[illegible] 189.00	(14.3%)
Other Expenses (including officers' salaries of $82,860.00)	$199,896.00	
Net Loss	($85,707.00)	

As of November 1, 1973, the salaries of the two officers were reduced from $800.00 per week each to $600.00 per week each. Contributions to pension funds were suspended.

At the time of the trial the final figures of FLM for fiscal 1974 were not available. However, it was estimated that sales for fiscal 1974 were approximately $694,000.00. The fiscal 1974 sales were down approximately $100,000.00 from the fiscal 1973 level. It was estimated that, at the end of fiscal 1974, FLM would have a deficit in its earned surplus account amounting to $18,607.00, after a $20,000.00 income tax refund. This contrasts with an earned surplus of $81,913.00 as of September 30, 1972.

FLM is suffering from a shortage of working capital which has restricted its ability to purchase inventory and equipment. With regard to price competition with Ford dealers for the business of repair shops, FLM is generally charging the repair shops the suggested retail price less 25%. McKee of FLM has testified, albeit in a general way, that FLM is experiencing price competition from some Ford dealers which FLM cannot afford to meet.

I find that FLM has suffered impairment of its ability to compete effectively in the wholesale market of Ford crash parts.

FLM has sought to prove that Ford's withdrawal of the wholesale incentive allowance resulted at least in part from complaints from Ford dealers competing with FLM and a desire by Ford to protect such dealers. There is no sufficient proof to support this point. However, it is clear that Ford understood in general that its discontinuance of the wholesale incentive allowance on crash parts sold to parties such as FLM would substantially impair the ability of such parties to participate in the distribution of Ford parts in competition with the regular Ford dealers. Also I cannot believe that the Ford personnel responsible for the change of policy respecting the wholesale incentive allowance did not have FLM specifically in mind as a shining example of the type of successful middleman Ford was attempting to discourage.

Conclusions of Law

Robinson-Patman Act

[1] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

It is not disputed that, since November 1972, Ford has charged to Ford dealers who sell to FLM a higher price than Ford charges for the same crash parts when a Ford dealer sells directly to an independent body shop. Putting aside for the moment the question of the purpose of Ford's price differentials, it would appear at least that the basic elements of a Section 2(a) violation are made out. Ford charges different prices to different purchasers—Ford dealers—for the same crash parts.

Ford asserts two defenses to the Robinson-Patman Act claim: *First,* that FLM has no standing to assert such a claim, since FLM is not a purchaser from Ford; *second,* that Ford's price differentials are not prohibited by Section 2(a) since they involve "functional discounts."

a. *The Standing of FLM to Sue*

For its argument against FLM's standing to sue, Ford relies upon dicta in a line of cases commencing with *Klein v. Lionel Corp.*, 237 F.2d 13 (3rd Cir. 1956). The opinion of the Third Circuit contains the statement (pp. 14-15):

> "The decisions of many cases have crystalized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination." (footnote omitted)

This statement was cited with approval in dicta in *Baim & Blank, Inc. v. Philco Corp.*, 148 F.Supp. 541, 543 (E.D.N.Y. 1957); *Bolick-Gillman Co. v. Continental Baking Co.*, 206 F.Supp. 151, 154 (D.Nev. 1961); *United Banana Co. v. United Fruit Co.*, 245 F.Supp. 161, 168 (D.Conn. 1965).

For reasons to be described hereafter, I am not at all certain that the Third Circuit intended to lay down any rule about standing under Section 2(a) as sweeping as the literal language of the dictum might indicate. In any event, I have concluded that any such rule is contrary to the intention of Congress as expressed in the Robinson-Patman and Clayton Acts.

Although Section 2(a) defines the conduct which is illegal, it does not explicitly deal with the question of what parties do or do not have standing to sue for violations. The statutory provision expressly dealing with the question of standing is Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

On its face, Section 4 of the Clayton Act would appear to be broad enough to provide for a civil action by any party who could make out a factual case of injury to his "business or property" by reason of any violation of the antitrust law. However, the courts have taken the view that Congress did not intend to confer such broad standing. *See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972) ("target area" doctrine applied in Sherman Act case).

[2] In dealing with the standing problem in the present case, the most compelling consideration is presented by the implications of Section 2(a) of the Robinson-Patman Act, indicating the intention of Congress as to the ambit of the statute's protection. I refer to the

language of Section 2(a), which prohibits price discrimination between purchasers,

> ". . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

Although the forbidden conduct under Section 2(a) is discrimination "between different purchasers," the language quoted above expressly recognizes that the competitive effects of such injury resulting from the discrimination may reach beyond the purchasers themselves. The statute, as quoted above, applies where competition is prevented (1) with a person who grants the discriminatory price, (2) a customer of the person who grants a discriminatory price, (3) a person who knowingly receives the benefit of a discriminatory price, or (4) a customer of a person who knowingly receives the benefit of a discriminatory price.

Considering this language in concrete terms, let us assume that a manufacturer (M) sells to two wholesalers (WA and WB). WA resells to a retailer (RA), and WB resells to a retailer (RB). M discriminates in price in favor of WA. This benefit is passed on to RA. RB is injured in its competition with RA.

Applying Section 2(a) to this situation, there would appear to be a violation of the statute, because M has discriminated in price between two purchasers, WA and WB, and because this discrimination has injured competition by RB with a customer (RA) of one who has received the benefit of the discrimination (WA).

[3] It would seem to be perfectly clear that Congress intended in Section 2(a) to confer protection upon those parties who are injured in their competition with the types of beneficiaries of the discrimination described in the statute. There is no doubt that such protected parties have standing under Section 2(a) to sue the party guilty of the discrimination. In our example, this would mean that RB would have the right to sue M, as well perhaps as WA and RA, if the latter parties had knowingly received benefit of the discrimination. This would be true even though RB is not a purchaser from M.

In *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969), plaintiff Perkins purchased gasoline and oil from Standard. Perkins was both a wholesaler, and a retailer through his own Perkins stations. Standard also sold to Signal, who resold to Signal's subsidiary Western Hyway, who in turn, sold to Western's subsidiary, Regal. Standard's prices to Signal were lower than its prices to Perkins, and the benefit of the discrimination was passed on to Regal. Regal operated service stations which were able to undersell Perkins' service stations. The Supreme Court held that Perkins had a valid claim for this competitive injury. The Court noted (p. 647, 89 S.Ct. p. 1874):

> "Here, Perkins' injuries resulted in part from impaired competition with a customer (Regal) of a customer (Western Hyway) of the favored purchaser (Signal)."

The Court went on to state (p. 648, 89 S.Ct. p. 1874):

"Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

"Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered. This is true regardless of the 'level' in the chain of distribution on which the injury occurs."

See also F. T. C. v. Sun Oil Co., 371 U.S. 505, 514, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963).

[4] The *Perkins* case does not, of course, expressly deal with the question of the standing of a non-purchaser to sue under Section 2(a) for competitive injury resulting from discrimination practiced upon a party farther up the line of distribution. The plaintiff in the *Perkins* case was a purchaser from Standard. However, the decision makes it clear that Section 2(a) is to be construed as covering competitive injuries at levels of distribution beyond the level of the purchasers from the defendant. The basic test enunciated by the Court for recovery of damages by an injured party was that he must "be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered" (*Id.* 395 U.S. at 648, 89 S.Ct. at 1874).

In my view, the *Perkins* decision is entirely inconsistent with the view that parties having standing to sue under Section 2(a) are limited to purchasers from the defendant.

I now return to the line of cases commencing with *Klein v. Lionel Corp.*, 237 F.2d 13 (3rd Cir. 1956), referred to earlier. The plaintiff in *Klein* was a retailer selling Lionel electric trains. Plaintiff purchased trains from wholesalers at suggested retail price less 40%. These wholesalers purchased from Lionel at suggested retail price less 52%. Lionel sold its trains directly, not only to wholesalers, but also to chain stores and mail order houses. Lionel charged the same price to the chain stores and mail order houses as it did to the wholesalers. Plaintiff sued, claiming that he was in competition with the chain stores and the mail order houses and that under Section 2(a), he should have been able to obtain his trains at the same prices as were charged to these chain stores and mail order houses. District Judge Rodney dismissed the complaint on a motion for summary judgment, on the ground that there had been no price discrimination by Lionel in its sales to *its purchasers*. Judge Rodney expressly left open the question of whether a retailer would have standing to sue for injury he sustained in the event there was discrimination practiced against his wholesaler. *Klein v. Lionel Corp.*, 138 F.Supp. 560, 564 (D.Del.1956).

The Court of Appeals for the Third Circuit affirmed. However, the opinion of the court of appeals did not limit its discussion to the precise problem at hand, as Judge Rodney had carefully done. The Court of Appeals stated (237 F.2d at 14-15):

"The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimi-

nation. In *Shaw's, Inc., v. Wilson-Jones Co.*, 3 Cir., 1939, 105 F.2d 331, 333, we stated: 'The discrimination in price referred to must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchasers mean simply one who purchases, a buyer, a vendee.' Klein did purchase Lionel products, but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser." (footnote omitted)

I should note that the cases cited by the court of appeals in *Klein* in support of its dictum about standing do not in fact support the proposition. Moreover, in my view the dictum in *Klein* is contrary to the clear meaning of Section 2(a), and cannot be followed in view of the implications of the Supreme Court decision in *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969).

It is necessary at this point to examine the nature of the competitive injury suffered by FLM and to determine whether it is within the purview of Section 2(a). In the hypothetical example given above, the competitive injury occurred between RA and RB, who were both retailers. Both were on the same "functional level of distribution." It is fairly easy to conceive of competitive injuries on the same functional level of distribution—*i. e.*, wholesalers vis-a-vis wholesalers, or retailers vis-a-vis retailers—as coming within the purview of Section 2(a).

There is a distinction between such a situation and the present case which must be noted. Let us consider that in the present case M is Ford, WA is a Ford dealer selling directly to an independent repair shop, and RA is this independent repair shop. WB is a Ford dealer selling to FLM, who stands between that Ford dealer and the independent body shop (RB) who is the customer of FLM. FLM claims to be harmed because Ford has discriminated in price between WA and WB, charging a higher price to WB, who sells to FLM. But FLM is not complaining about being at a competitive disadvantage with another FLM-type middleman. Because of the relatively low markup it has been able to negotiate with WB, and because FLM has been able to offer superior services to certain independent repair shops, FLM has been able to compete with Ford dealers such as WA.

Is FLM on the same functional level of distribution as the party it is competing with—WA? In one sense it is, in that FLM competes with WA for the business of the independent repair shops. But in another sense FLM is *not* on the same functional level with WA, because FLM is twice removed in the chain of sales from Ford. Moreover, FLM is not seeking to have its purchase price equalized with the purchase price of WA. It is only seeking to have the purchase price of *WB* equalized with that of WA.

The question is whether Section 2(a) protects, among other things, the type of competition engaged in by FLM, which is with parties not precisely on the same functional level of distribution. In *F. T. C. v. Fr-' Meyer, Inc.*, 390 U.S.

341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), a case under Section 2(d) involving promotional allowances, the Supreme Court held, on the facts of that case, that the competitive injury contemplated by Section 2(d) was that occurring on the same functional level of distribution. However, the Court noted that no such limitation is made in Section 2(a). The Court stated (pp. 356–57, 88 S.Ct. 904, p. 912):

> "We noted in *FTC v. Sun Oil Co.*, 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963), that when Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act by prohibiting price discrimination which may 'injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.'"

[5] I hold that the type of competition engaged in by FLM with Ford dealers is within the protection of 2(a).[6]

6. Section 2(a) has been held to apply to competitive injury occurring where the competitors are on different functional levels of distribution. *Purolator Products, Inc.*, 65 F.T.C. 8 (1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 758, 19 L.Ed.2d 837 (1968). There the Commission found a competitive injury covered by Section 2(a), where jobbers competed with wholesale dealers from whom the jobbers purchased goods. The facts in *Purolator* were substantially different from the facts presented in the present case, and resort was had in *Purolator* to the "indirect purchaser" doctrine, which, for reasons described hereafter, I hold inapplicable to the present

I alluded earlier to the "target area" doctrine enunciated in such cases as *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972). The target area doctrine has been applied in a case which involved, in part, the Robinson-Patman Act. *Billy Baxter, Inc. v. Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971).

[6] Applying the "target area" test to the present case, it would seem to be clear that FLM is within the target area of the alleged wrongful price discrimination practiced by Ford. The purpose of Ford's change of policy regarding the wholesale incentive allowance was to withdraw this price benefit from Ford dealers who sold to middlemen such as FLM. It was the obvious desire of Ford to cut the middleman out of the channel of distribution, and have the Ford dealers sell directly to the independent body shops. As Ford has candidly admitted in its Trial Memorandum filed in this action, FLM "is neither needed nor desired" in the distribution of Ford crash parts (p. 237).

case. However, *Purolator* does illustrate th point that Section 2(a) can be applied, in an appropriate case, to a competitive injury where the competitors are not on the same functional level.

In *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), to be described more fully later in this opinion, the Supreme Court found a Sherman Act violation where General Motors combined with certain of its Chevrolet dealers to prevent other Chevrolet dealers from selling to discount houses, thereby preventing the discount houses from competing with dealers.

I conclude therefore that FLM has standing to sue Ford claiming (1) that Ford discriminates in the price of crash parts in favor of Ford dealers who sell directly to independent body shops and against any Ford dealer who sells to FLM, and (2) that FLM is harmed by this discrimination in its attempt to compete with Ford dealers for the business of the independent repair shops.

FLM has urged, as alternative grounds for its standing under Section 2(a), the application of the so-called "indirect purchaser" doctrine or the somewhat related doctrine of *F. T. C. v. Fred Meyer, Inc.*, 390 U.S. 341, 88 S. Ct. 904, 19 L.Ed.2d 1222 (1968). I have concluded that neither of these theories is applicable to the present case.

The indirect purchaser doctrine has been developed to cover situations where a defendant has *de facto* control over the purchase price paid for goods by parties more than one step removed from the defendant in the line of distribution. The basic idea is that if such a defendant in some way controls the prices to such customers by means of suggested price lists or otherwise, they become "indirect purchasers" from the defendant within the meaning of § 2(a). *American News Co. v. F. T. C.*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962); *Purolator Products, Inc.*, 65 F.T.C. 8, 32 (1964), *aff'd*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045, 88 S.Ct. 758, 19 L.Ed.2d 837 (1968); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). *Cf. F. T. C. v. Fred Meyer, Inc.*, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

[7] FLM argues that Ford "controls" the prices charged by a Ford dealer selling to FLM, so that the indirect purchaser doctrine applies. It is true that a Ford dealer is not likely to charge FLM less than what Ford has charged to the dealer. However, this is not the type of "control" which brings into play the indirect purchaser doctrine. Otherwise the doctrine would apply to every resale of goods. The crucial point in the present case is that Ford has never sought to suggest or influence in any way the markup charged by a Ford dealer to FLM. This is strictly a matter of negotiation between the Ford dealer and FLM. There is no "suggested" price to FLM, as there is in the usual case involving the indirect purchaser doctrine. *American News Co. v. F. T. C.*, *supra*; *Purolator Products, Inc.*, *supra*; *Champion Spark Plug Co.*, 50 F.T.C. 30, 44-45 (1953); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943).

Moreover, it would be wholly inappropriate to apply the indirect purchaser doctrine in the present case, because FLM is not seeking, nor would there be any grounds for the court to require, an equalization of prices paid by FLM vis-a-vis competing Ford dealers.

I also conclude that *F. T. C. v. Fred Meyer, Inc.*, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), is not directly applicable to the present case. There the Supreme Court held that, in order to carry out the purposes of Section 2(d), a small retailer purchasing through a wholesaler should be considered to be a "customer" within the meaning of that section. The Court held that such a retailer was entitled to equal promotional allowances with a large direct-buying retailer. The Court emphasized that both retailers were on the same functional level of distribution.

The present case is distinguishable in an essential respect. The *Fred Meyer* doctrine was intended to equalize the position of the parties found by the Court to be customers. However, in the present case, as already noted in my discussion of the indirect purchaser doctrine, FLM is not seeking to obtain, nor could it properly be permitted to obtain, equalization of its prices with the prices paid by the Ford dealers.

(b) *The Functional Discount Defense*

[8, 9] Given the fact that I have limited FLM's Robinson-Patman Act case to a claim for discrimination between Ford dealers, Ford has asserted only one defense on the merits.[7] This defense is that Ford's price differentials to the dealers constitute permissible functional discounts.

Ford starts with the proposition that it is legal to charge a Ford dealer acting as a wholesaler less than a Ford dealer acting as a retailer. This is, of course, the basic price differentiation created by the wholesale incentive allowance for crash parts as it was originally promulgated in 1968.

7. Proof of a price differential is prima facie proof of injury to competition within the meaning of Section 2(a). *Samuel H. Moss, Inc. v. F. T. C.*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 538 (1945). It is further held that an injury to a competitor is sufficient proof of injury to competition. *F. T. C. v. Morton Salt Co.*, 334 U.S. 37, 49, 68 S.Ct. 822, 92 L.Ed. 1196 (1948).

Ford goes on to argue that, as the grantor of the wholesale incentive allowance, it has the legal right to define what the "wholesale function" is, and to define this function as referring only to *direct* sales by Ford dealers to independent repair shops, as distinct from indirect sales through an entity such as FLM. Ford's view is that when a dealer sells to FLM, it is not performing the wholesale function itself, but is merely delegating that function to FLM. Ford contends that it can validly withhold the wholesale incentive allowance as to any dealer who thus fails to directly perform the wholesale function.

[10] I have concluded that Ford's notion of the extent of its powers with respect to functional discounts is contrary to Section 2(a) of the Robinson-Patman Act. Ford undoubtedly has the right to charge a different (lower) price for a crash part to a Ford dealer when that dealer resells the part at wholesale, than Ford charges for the part when the dealer resells at retail. This is a standard functional discount, where a supplier charges different prices to purchasers at different functional levels of distribution, and where the *higher* price is charged to the purchaser at the level *farther* from the supplier in the chain of distribution—*i. e.*, the retailer is charged more than the wholesaler. This is a standard business practice and has been sanctioned by the legal authorities.

[11] However, the situation is sharply different with respect to Ford's attempt to delineate the applicability of the wholesale incentive allowance in such a way as to deny the allowance when parts are sold to FLM, by charging a higher price to a dealer when it sells

to FLM than Ford charges to a dealer when it sells directly to the independent repair shop. The pricing differential here is *not* between purchasers at different functional levels of distribution. Viewed realistically, the Ford dealer selling to FLM is on the *same* functional level as the Ford dealer selling to the independent repair shop. Both of these Ford dealers are in practical fact selling at the wholesale level, although one wholesales directly to independent repair shops and the other wholesales indirectly through FLM. At least it is clear beyond question that the Ford dealer which sells to FLM is not *retailing* the parts. But the prices which such a dealer must pay Ford for parts resold to FLM are the same prices as a dealer pays to Ford when he retails the parts.

Basically Ford's policy respecting the wholesale incentive allowance amounts to discrimination in prices charged to purchasers at the same functional level of distribution (the wholesale level) with the purpose and effect of limiting or inhibiting the type of resale trade engaged in by these purchasers. This is not valid functional discounting.

Neither the Robinson-Patman Act nor the original Section 2 of the Clayton Act, 38 Stat. 730 (1914), makes any express reference to functional discounts. However, in a case arising under Clayton Act § 2, the Second Circuit approved in dictum the practice of charging different prices to wholesalers and retailers because of no adverse effect on competition. *Mennen Co. v. F. T. C.*, 288 F. 774, 781 (2d Cir.), *cert. denied*, 262 U.S. 759, 43 S.Ct. 705, 67 L.Ed. 1219 (1923).

When the 1936 amendments to Section 2 of the Clayton Act were being considered, provisions about functional discounts were proposed in both the Senate and the House. The proposal in the Senate was as follows:

> "*Provided*, That nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase as factors, or wholesalers, or retailers, or consumers, or for use in further manufacture . . . ." 80 Cong.Rec. 6428 (1936).

The proposal in the House was:

> "That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; for the purpose of such classification of customers as wholesalers or jobbers, or retailers, the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who, directly or indirectly, through a subsidiary or affiliated concern or broker, does both a wholesale and retail business shall, irrespective of quantity purchased, be classified (1) as a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser; and (2) as a retailer on purchases for sale to consumers." H.R.Rep.No.2287, 74th Cong., 2d Sess. 1-2 (1936).

However, reference to functional discounts was entirely omitted from the Robinson-Patman Act as finally passed. This omission was apparently the result of farm opposition, based on the fear of disadvantages to farmers' cooperatives. 80 Cong.Rec. 8113, 8139 (1936).

The Congressional refusal to enact an express sanction for functional discounts has not been interpreted as indicating an intent to absolutely prohibit such discounts. It is assumed that Congress intended functional discounts to be judged under the general provisions of the statute in the same way as other pricing differentials, without any special treatment. Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act*, 60 Harv.L.Rev. 571 (1947); Kelley, ***Functional Discounts Under the Robinson-Patman Act***, 40 Calif.L.Rev. 526 (1952); Rowe, ***Price Discrimination Under the Robinson-Patman Act***, 173 (1962).

The basic test for the validity of a functional discount is whether there is an injury to competition. The Rowe text states (*Ibid.*):

> "The nature of the competition between the customers paying the higher and the lower prices is the key to the legality of 'functional discounts' or trade price differentials under the Robinson-Patman Act."

In general, it is accepted both from an economic and a legal standpoint, that a valid functional discount is one where the lower price is charged to the functional level nearer to the supplier, and the higher price is charged to the functional level farther from the supplier—*i. e.*, where distributors pay less than wholesalers, and wholesalers pay less than retailers. The Rowe text describes it as follows (*Id.* at 174):

> "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer). Put another way, wholesalers or jobbers (or their equivalent) may receive greater discounts or lower prices than retailers or dealers—so long as the wholesalers or jobbers sell only *to* retailers or dealers but not to consumers *in competition with* the retailers paying more."

This is basically the view taken by the Federal Trade Commission, as expressed in *Doubleday and Co., Inc.*, 52 F.T.C. 169, 207 208 (1955), and *General Foods Corp.*, 52 F.T.C. 798 (1956). In *General Foods* the Commission stated (*Id.* at 824):

> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result."

However, I hold that neither the statute nor the authorities interpreting it sanction the price differentials of Ford complained about by FLM. As described earlier, Ford is discriminating in price between Ford dealers who are operating at the *same* functional level of distribu-

tion. Ford does this for the specific purpose of inhibiting sales to middlemen such as FLM and for the purpose of discouraging such middlemen from competing in the distribution of crash parts.

Ford contends that it should not be compelled to make provision in its distribution system for what it regards as a superfluous intermediary such as FLM. Ford contends that it should not be required to give a wholesale incentive allowance to a Ford dealer who fails to perform a "wholesale function" and merely delegates this responsibility to FLM. These contentions do not provide a valid defense to Ford.

FLM is not seeking to have Ford set up any special or unique discount—such as a distributor's discount—for Ford dealers who sell to FLM. FLM is not seeking to have any "suggested" price for sales by Ford dealers to FLM, which would establish FLM as a part of Ford's regular, contemplated distribution system. What FLM is seeking is simply to have Ford charge the same wholesale price to its dealers whether they sell to FLM or directly to an independent body shop. FLM is seeking the opportunity to purchase crash parts from Ford dealers, and to freely participate in competition for the distribution of these parts, without the positive hindrance presented by Ford's price discrimination.

[12] I also reject the contention of Ford that Ford can charge a higher price

for crash parts to a Ford dealer because Ford views that dealer as not performing the "wholesale function" when it is selling to FLM. A Ford dealer buying parts for wholesale should be basically free to choose its own channels of distribution—*i. e.*, be free to decide whether it will sell directly to an independent repair shop or sell to a middleman such as FLM who in turn sells to the independent repair shop. Moreover, a company such as FLM should be free to purchase from the Ford dealer and to compete, through offering superior service, for the business of the independent repair shops.

The case of *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), is instructive in this regard. Although this case was brought under Section 1 of the Sherman Act, it illustrates the type of competitive interests which are involved in the present case. There General Motors had combined with franchised Chevrolet dealers in Los Angeles to prevent discount houses from purchasing cars from certain franchised dealers. The discount houses were competing with the dealers in the retail sales of Chevrolet cars. The Supreme Court held that this was an illegal restraint of trade in that it was calculated "to deprive franchised dealers of their freedom to deal through discounters if they so choose" (*Id.* at 140, 86 S.Ct. at 1328). The Court further described the fact that there was action by the defendants "to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade . . ." (*Id.* at 144, 86 S.Ct. at 1330).

These passages describe the basic vice of Ford's actions in the present case. Ford's revised wholesale incentive policy was designed to discourage franchised Ford dealers in their freedom to deal through middlemen such at FLM if they so choose. Moreover, Ford's revised policy necessarily has the ultimate effect of eliminating, or sharply curtailing, middlemen such as FLM from participation in the market.

[13] I referred earlier to Ford's evidence that two of its considerations giving rise to the amendment in its wholesale incentive allowance rules were the concern that a middleman such as FLM might operate as a conduit between Ford dealers, and the concern that a Ford dealer selling to such a middleman would seek a special distributor's allowance. The fact is, as I have found, that nothing in connection with the activities of FLM, or the Ford dealers' sales to FLM, provided the slightest basis for either of these concerns. Ford does not really argue to the contrary. Ford's contention is that these were concerns respecting *other* parties and other areas of Ford's spare parts business, giving rise to the need for general rules and regulations, which perchance apply to FLM.

This situation constitutes no valid justification, under the statute or the applicable authorities, for the anti-competitive price discrimination which Ford has instituted. This is particularly true in view of the fact that there is no evidence of any real attempt by Ford to solve its alleged problems by means that do not involve price discrimination.

For these reasons, I hold that Ford's discrimination in the price of crash parts between Ford dealers who wholesale directly to independent repair shops and Ford dealers who sell to middlemen such as FLM is a violation of Section 2(a) of the Robinson-Patman Act and does not constitute valid functional discounting.

Sherman Act

I hold that FLM has not made out a valid case under either Section 1 or Section 2 of the Sherman Act.

For its Section 1 claim, FLM relies on cases such as *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) and *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), involving agreements between a supplier and its dealers or distributors fixing resale prices and allocating territories. The short answer to this argument is that no such agreement has been shown by the evidence in this case.

[14] The illegal activity of Ford is in the setting of discriminatory prices it charges to dealers selling to FLM. The sole activity of the dealers vis-a-vis Ford is to pay the prices charged by Ford. FLM has not proved the existence of any agreement between Ford and any dealers that the dealers would not sell to FLM. Indeed certain Ford dealers are still selling to FLM. There is no evidence that any Ford dealers have entered into an agreement with Ford as to what prices the dealers will charge to FLM. The dealers pay Ford the prices charged by Ford, and then sell to FLM at a markup above these prices—the markup being negotiated with FLM. This is by no means a resale price agreement within the meaning of the authorities.

[15] In support of its Section 1 claim FLM urges that there was a combination or conspiracy between defendant Ford Motor Company and defendant Ford Marketing Corporation. There is no evidence to support this contention. Ford Marketing Corporation did not come into existence until 1970. It assumed the marketing responsibility for Ford automobiles and parts commencing in July 1970. Ford Marketing Corporation was, of course, in existence during 1971 and 1972 when the events complained of in this action occurred. The essential point is that the relevant actions with respect to the wholesale incentive discount were undertaken, as far as the evidence shows, solely by personnel in the marketing arm of Ford, whether this arm was a division within Ford Motor Company or was a separate corporation, Ford Marketing Corporation. There is no evidence of any combination or conspiracy between the two corporations.

For its Sherman Act § 2 claim, FLM relies upon cases such as *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), and *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), holding that Section 2 prohibits the use of monopoly power on one level of distribution to destroy competition on another level. *See also Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Aluminum Co. of America*, 148 F.2d 416, 437-39 (2d Cir. 1945).

However, these cases involved vertical integrations between the two levels. In *Kodak*, the defendant manufactured film products and owned the retail stores that sold these products in competition with plaintiff. In *Otter Tail* the defendant

generated power, and distributed it through its own retail distribution system, which sold power in competition with municipally owned retail distribution systems.

[16] In the present case Ford distributes automobiles and crash parts, but it does not own the franchised dealers who wholesale these parts in competition with FLM. The exception to this is the so-called dealer development franchise, where Ford has a temporary ownership interest in the dealer for financing purposes. However, the evidence in this case about dealer development franchises is fragmentary and is hardly sufficient to permit a finding of vertical integration between Ford and its dealers.

On the basis of the record in the present case as a whole, I decline to extend the rule of the *Eastman Kodak Co.* case and the other cases referred to above to cover the situation of Ford and its franchised dealers.

Ford's Refusal to Sell Directly to FLM

[17] FLM has advanced the contention (although not forcefully) that Ford has violated the antitrust laws in refusing to sell crash parts directly to FLM rather than selling exclusively to franchised Ford dealers. I reject this contention for reasons which I will set forth briefly.

Section 2(a) of the Robinson-Patman Act expressly provides:

". . . That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; . . ."

Based on well-established law, Ford had the right to distribute automobiles and crash parts manufactured by it solely to franchised dealers. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Atalanta Trading Corp. v. F. T. C.*, 258 F.2d 365, 372–73 (2d Cir. 1958); *Naifeh v. Ronson Art Works*, 218 F.2d 202 (10th Cir. 1954); *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949).

I have already held that it is illegal for Ford, by means of price discrimination, to inhibit a dealer from selling to a middleman such as FLM, and to inhibit FLM from freely purchasing crash parts from a Ford dealer in order to compete in the distribution process. With this price discrimination removed, Ford is free to restrict its sales to its dealers. There is ample evidence of valid economic and administrative justification for such restriction.

Conclusion

FLM is entitled to injunctive relief and damages on its claim of price discrimination under Section 2(a) of the Robinson-Patman Act. FLM is entitled to no relief or recovery under its other antitrust claims. Following the completion of the record as to the amount of damages, there will be a supplemental opinion on that subject.

FLM COLLISION PARTS, INC., Plaintiff,

v.

FORD MOTOR COMPANY and Ford Marketing Corporation, Defendants.

No. 73 Civ. 713.

United States District Court, S. D. New York.

March 17, 1976.

SUPPLEMENTAL OPINION

GRIESA, District Judge.

On December 19, 1975 I filed an opinion holding that plaintiff FLM Collision Parts, Inc. is entitled to injunctive relief and damages under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. § 13(a). I stated that a supplemental opinion would be issued on the amount of damages to be awarded following completion of the record on that subject.

The record is now complete. This supplemental opinion contains my findings of fact and conclusions of law as to the amount of damages, and also as to the amount of the attorneys' fee to be awarded pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

Damages

There are five items of damages claimed by FLM which require specific discussion. Certain other damage claims have been made by FLM based upon its theories of Sherman Act violation. Since these Sherman Act theories were rejected in my earlier opinion on liability, I will not deal further with the related issues of damages.

Wholesale Incentive Allowances

FLM claims that it should recover the total amount of the wholesale incentive allowances which were denied by Ford commencing November 1, 1972.

Ford, in its Post-Trial Brief (pp. 92-96), basically conceded that, if there were liability, FLM would be entitled to recover the amount of these wholesale incentive allowances, provided that such amounts were accurately proved. In further proceedings, Ford has advanced two contentions. Ford argues that there is no showing that the entire amount of these wholesale incentive allowances would have been "passed on" by the Ford dealers to FLM. Ford also contends that the amount of the award for such allowances should be diminished by the alleged additional bookkeeping costs which FLM would have been required to incur in order to claim the wholesale incentive allowances.

FLM has accurately proved the amount of the wholesale incentive allowances which should have been granted on Ford crash parts purchased by it during the relevant period. This period runs from November 1, 1972 to early 1976, when the final evidence was being introduced on the subject of damages. For the sake of convenience, a reasonable cutoff date for the damage period was selected—February 6, 1976. I find that FLM has proved wholesale incentive allowances withheld in the total amount of $246,766.

[1] I reject the contention that FLM has failed to show that the entire amount of these wholesale incentive allowances would have been passed on to FLM by the Ford dealers. Prior to the withdrawal by Ford of the wholesale incentive allowances on sales to FLM, these allowances were consistently passed on to FLM.[1] There is not the slightest reason to believe that this practice would not have continued had it not been for the action of Ford in halting the granting of the wholesale incentive allowances on crash parts sold to FLM.

[2] I also find no merit in Ford's contention that the amount of the award for wholesale incentive allowances withheld should be diminished to take into account alleged additional bookkeeping costs. Ford points to the allegation of FLM that about $46,000 was spent on accounting services rendered to FLM *in the present litigation.* Ford assumes quite reasonably that some portion of this $46,000 relates to the detailed review of invoices and other records necessary to reconstruct the amount of wholesale incentive allowances which should have been granted during the period November 1, 1972 to February 6, 1976, and argues that this indicates that there would have been additional bookkeeping expenses to calculate the wholesale incentive allowances even if allowance claims had been handled in the normal course of business.

1. It is true, of course, that the Ford dealer supplying FLM with parts charged a markup of 3% during the time the wholesale incentive allowance was in effect for sales to FLM. The application of this 3% markup is described in my earlier opinion. However, there would be no justification for deducting the 3% markup from the damage award. FLM has *already* paid a markup to its supplying Ford dealers on the parts on which the damage award is calculated. Indeed the markup has been 5%.

Ford's argument is unrealistic. There is a great difference between calculating wholesale incentive allowances in the normal course of business and reconstructing this calculation for the purpose of litigation. There is no sufficient indication that FLM would have incurred any appreciable additional expense in order to process the wholesale incentive allowance claims in normal course.

For these reasons I find that FLM is entitled to damages in the amount of $246,766 representing wholesale incentive allowances which should have been granted.

Lost Sales

[3] FLM claims that its sales were consistently growing at a rapid rate until the time that Ford denied the wholesale incentive allowance, and that its sales would have continued to grow at the same rate during the years following the cutoff of the wholesale incentive allowance. FLM contends that this growth was prevented by Ford's wrongdoing, and that damages should be awarded based upon the alleged loss of growth.

I have concluded that this claim, as presented by FLM, is entirely too speculative to justify an award of damages.

However, FLM is entitled to damages on a related, but somewhat different, theory. As described in my earlier opinion, FLM's sales grew steadily for several years from its commencement of business in 1965. During the fiscal year ending September 30, 1972—the last full fiscal year prior to the withdrawal of the wholesale incentive allowance—FLM's sales were $736,967. The wholesale incentive allowance was cut off about November 1, 1972.

The economic effects of this cutoff were felt by FLM in stages. FLM was able to continue its growth in sales in fiscal 1973. The sales for that year were $798,947. However, the severe cut in FLM's profit margin produced a net loss of $85,707.

Prior to 1974 both FLM and the franchised Ford dealers with whom FLM competed in the sale of crash parts generally sold these parts to the independent repair shops at a 25% discount off the suggested retail price. Commencing in 1974 three of FLM's competitors—Empire Ford in Mt. Vernon, Ruckle Ford in Yonkers, and W. H. Jackson Ford Sales in Ossining—commenced granting substantially larger discounts than 25%. Since FLM, unlike its Ford dealer competitors, did not have the benefit of the wholesale incentive allowance, FLM could not afford to meet this price competition. FLM was also, by this time, experiencing a serious shortage of working capital. These conditions cut substantially into FLM's sales.

FLM's sales for fiscal 1974 were $695,188—down approximately $100,000 from the 1973 level. The basic adverse effect on FLM's sales volume continued after fiscal 1974, although sales in *dollar* terms rose above the 1974 level because of price inflation. Sales for fiscal 1975 were $722,681. Sales for the period October 1975 through February 6, 1976 were $301,803.

FLM has made a careful calculation, in dollar terms, of the net loss of sales commencing in fiscal 1974 and running to February 6, 1976 based upon a comparison with the level of 1973 sales. The total net loss of sales under this calculation is $169,456.[2] FLM has also made a calculation of the amount of net profit which FLM would have earned on the basis of this $169,456, assuming among other things that the wholesale incentive allowance would have been granted with respect to parts purchased. FLM's accounting methods in these calculations appear satisfactory, and are unchallenged by any convincing testimony or argument. Such net profit is $44,736, to which FLM is entitled as damages.

Increased Markup by Dealers

[4] FLM claims that Ford's denial of the wholesale incentive allowance disrupted FLM's business relations with its then supplier of crash parts, Atlas Lincoln-Mercury. FLM claims that its subsequent suppliers have charged a 5% markup, instead of the 3% markup charged by Atlas. FLM claims the 2% differential as damages.

It is certainly true that Ford withdrew the wholesale incentive allowance on sales to FLM and that shortly thereafter FLM ceased doing business with Atlas, and commenced obtaining its supplies of crash parts from other Ford dealers. However, there is no sufficient showing that Ford's actions were the proximate cause of the termination of FLM's business dealings with Atlas. There is no indication that Ford prevented FLM and Atlas from negotiating to continue business after the withdrawal of the wholesale incentive allowance. Ford certainly did not prevent FLM from purchasing from *other* Ford dealers. As to the amount of markup charged by these other dealers, this was strictly a matter of negotiation between FLM and such dealers. Ford is not liable for this item of damages.

Obsolescence Credit

[5] FLM claims that Atlas permitted FLM to obtain half of a 5% obsolescence credit allowed by Ford on crash parts. FLM claims that the subsequent suppliers have not permitted FLM to obtain any part of this credit, and that damages should be awarded for this alleged loss.

There is no evidence to indicate that Ford had anything to do with certain Ford dealers denying FLM the benefit of obsolescence credits. Ford is not liable for this item of damages.

Loss of Good Will

[6] FLM contends that the "good will" value of its business has been destroyed, and seeks damages for this loss.

By good will, FLM refers to what a buyer would pay for the business as a going concern. FLM claims its business had a value of about $1 million prior to Ford's withdrawal of the wholesale incentive allowance. FLM contends that the value of its business has been entirely destroyed "since no purchaser will pay for that business knowing that the defendants are seeking for a way to prevent the plaintiff from continuing in business" (Plaintiff's Post-Trial Brief p. 69). This theory of damages is inappro-

2. This takes into account that, in dollar terms, the sales for the period October 1975 through February 6, 1976 ($301,803) were actually greater than pro rated sales at the 1973 level for the same period ($274,758). Ford is given credit for this in the overall calculation despite the fact that the increased dollar volume was due to price inflation.

priate in the present case. The wrongdoing of Ford will be the subject of injunctive relief. Plaintiff's expert witness admitted that the possibility of injunctive relief would affect his opinion regarding the destruction of FLM's good will value. He further admitted that he had not taken such possibility into account in making his calculation. I conclude that FLM is not entitled to this item of damages.

Summary Regarding Damages

FLM has proved damages in the amount of $246,766 representing wholesale incentive allowances withheld on parts purchased commencing November 1, 1972. FLM has proved damages in the amount of $44,736, representing the net profit FLM would have earned on sales lost due to the wrongful acts of Ford. The total of these two amounts is $291,502. FLM is entitled to recover treble this amount, or $874,506.

Attorneys' Fees

FLM's attorneys—David L. Wasser, Esq. and the firm of Julien & Schlesinger—apply for an award of attorneys' fees in the total amount of $425,000. Application is also made for payment to Mr. Wasser of an additional $36,500 to cover accounting services rendered by him. In addition, payment of $10,350 is sought for two other accountants—Morris Israel and Jack Brand. Finally, FLM seeks to have costs of the action taxed in the amount of $1300.90.

When the controversy between FLM and Ford originally arose, FLM was represented by Wasser, who was both the accountant and attorney for FLM. Commencing in the fall of 1972, Wasser complained to Ford about its conduct, had discussions with representatives of the Federal Trade Commission, and prepared the complaint in this action, which was filed in February 1973. Wasser presented a motion for preliminary injunction against Ford which was withdrawn in March 1974.

In July 1974 the firm of Julien & Schlesinger was brought into the case. Thereafter, Wasser and Julien & Schlesinger worked together on discovery and the trial of the case.

The case involved a relatively small amount of discovery followed by a seven-day trial in late September and early October 1974. There was extensive briefing on the difficult legal issues in the case before, during and after the trial. Following the original opinion of the court on liability, filed December 19, 1975, there were further hearings on damages February 9 and March 2, 1976

[7] The method to be used in calculating attorneys' fees is to start with the amount of time the attorneys have expended on the case, and to value that time by applying the hourly rate which attorneys of like skill in the area would typically be entitled to. After this calculation is made, adjustment should be made for such factors as the magnitude and complexity of the litigation, the amount recovered and litigation risks

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

Wasser states that he spent 1277 hours on legal work, as distinct from accounting work. Wasser uses a rate of $100 per hour, producing a total dollar figure of $127,700. The firm of Julien & Schlesinger represents that the time spent and appropriate billing rates were as follows:

Alfred S. Julien -- senior partner --
197 hours $200 per hour total $39,400
Stuart A. Schlesinger junior partner --
268 hours -- $125 per hour -- total $33,500
David Jaroslawicz senior associate --
362 hours -- $65 per hour -- total $23,530.

The total of this time for Julien & Schlesinger is 827 hours, and the total dollar amount is $96,430.

The total time claimed to have been spent by Wasser and Julien & Schlesinger on legal work for the case is 2104 hours, and the total of the dollar amounts shown above for all the lawyers is $224,130.

There are several difficulties with these calculations. In the first place, neither Wasser nor any of the attorneys at Julien & Schlesinger maintained time records. It is nothing short of amazing that this should be so, in view of the warnings issued by our Court of Appeals in analogous cases. *In re Borgenricht*, 470 F.2d 283, 284 (2d Cir. 1972); *In re Hudson & Manhattan R. R.*, 339 F.2d 114, 115 (2d Cir. 1964). Also, the decision in *City of Detroit v. Grinnell Corp., supra*, which emphasized the importance of the attorneys' time calculations in connection with antitrust fee applications, was handed down on March 13, 1974. This was four months before Julien & Schlesinger were retained in the present case.

[8] Another problem is that, under the applicable law, no award of attorneys' fees can be made under Section 4 of the Clayton Act except for services related to the successful recovery of treble damages under that section. In other words, no award can be made under the statute for work devoted exclusively to the pursuit of injunctive relief or of unsuccessful theories of liability. *Decorative Stone Co. v. Bldg. Trades Council*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928); *Trans World Airlines, Inc. v. Hughes*, 312 F.Supp. 478, 482-83 (S.D.N.Y.1970), *aff'd*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

[9] Applying this rule to the present case, it is clear that the time spent by Wasser in complaining to Ford, in having discussions with the Federal Trade Commission and in presenting the motion for preliminary injunction cannot be the basis for recovery of a fee award. Moreover, time spent by either Wasser or Julien & Schlesinger in pursuing the unsuccessful Sherman Act claims and in drafting the permanent injunction cannot be the basis for a fee award. I am now speaking of efforts devoted *solely* to these activities—activities which did not also relate to the successful Robinson-Patman Act damage claims. To the extent that work was carried out which bore upon *both* the Robinson-Patman Act damage claims and upon requests for injunctive relief and other theories of recovery, there can be an award of attorneys' fees under the statute. *Trans World Airlines, Inc. v. Hughes*, 312 F.Supp. at 483.

[10] Another problem is that, to the extent that there was duplication of effort as between Wasser and Julien & Schlesinger, the fee award must be reduced. *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 1975 2 Trade Cas. ¶ 60,551 (S.D.N.Y.1975).

The task of sorting out what time related to recoverable items and what time related to non-recoverable items is obviously made more difficult than it should be because of the failure of the attorneys to keep time records. However, there is no alternative but to make reasonable estimates on the basis of available information.

I am compelled to disallow most of the time claimed to have been spent by Wasser on legal services.

Wasser asserts that he spent 280 hours through the time the complaint was filed. He conferred with his client, with Ford's counsel and with the Federal Trade Commission. He performed legal research and drafted the complaint. It is clear that out of this 280 hours the only recoverable time is that which was spent on factual investigation and legal research leading up to the commencement of this action, and also time spent on drafting the complaint. I will allow only 100 out of the 280 hours.

Wasser asserts that he spent 335 hours in connection with the application for preliminary injunction. There is no basis for allowing any of this time.

Wasser claims that 409 hours were spent on "Discovery and Trial Preparation." I conclude that almost all of this time was a duplication of work done by Julien & Schlesinger. The one item which was not duplicative was Wasser's preparation of interrogatories prior to the retention of Julien & Schlesinger. I will allow 75 out of the 409 hours.

[11] Wasser claims a total of 253 hours for time spent at the trial and in post-trial activities. I conclude that the great bulk of this time was either a duplication of the work of Julien & Schlesinger or was work in Wasser's capacity as an accountant and expert witness. The cost of these services is not recoverable as attorneys' fees or costs under Section 4 of the Clayton Act. *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577; *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964). I will allow only 50 out of the 253 hours.

The total amount of time allowed for Wasser is 225 hours. As to Wasser's hourly rate, I find no reason to challenge his figure of $100. Applying this rate to the 225 hours, gives a total of $22,500.

As to the time spent by Julien & Schlesinger, the estimate of 827 hours for the three lawyers involved is not unreasonable, although it would have been far more satisfactory to have actual time records. The problem comes in attempting to calculate the time spent on compensable items versus the time spent on noncompensable items. The principal items in the latter category would relate to the unsuccessful Sherman Act claims. On this point I am concerned primarily with legal research and legal briefing, since the preparation and presentation of evidence in the case related both to the Sherman Act claims and to the successful Robinson-Patman Act damage claims. I am excluding 20 hours for Julien, 40 hours for Schlesinger, and 80 hours for Jaroslawicz in connection with briefing of Sherman Act claims. A certain

amount of time must also be excluded for work on the final injunction. In this regard, I am deducting 2 hours for Julien and 5 hours for Schlesinger. This gives net totals for the three attorneys from Julien & Schlesinger as follows:

Julien	175 hours
Schlesinger	223 hours
Jaroslawicz	282 hours

[12] With respect to the hourly rate to be applied, Julien & Schlesinger reported to the Court that the rates for the three attorneys respectively, charged in matters billed by the hour, were $200, $125, and $65. I find that the appropriate hourly rates are $135, $100, and $65.

Applying these rates to the number of hours spent by the attorneys at Julien & Schlesinger gives a total amount of $64,-255. Adding this to the $22,500 for Wasser gives a total of $86,755.

A fee somewhat above this amount is appropriate. The litigation was attended with numerous difficulties and risks. There was no assistance from any prior governmental proceeding. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 71 (2d Cir. 1974). Under all the circumstances, I am awarding attorneys' fees in the amount of $135,000.

The application for fees for accounting work of Israel and Brand is denied. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964); *see Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577; *Straus v. Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924).

Costs will be taxed by the Clerk of the Court in the normal manner.

Conclusion

FLM is entitled to judgment in the amount of $874,506 plus attorneys' fees in the amount of $135,000, together with costs to be taxed by the Clerk of the Court.

A judgment and final injunction will be signed and filed today.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-904

FLM COLLISION PARTS, INC.,

Petitioner,

—against—

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 543 F.2d 1019 (2d Cir. 1976). The opinions of the District Court for the Southern District of New York are reported at 406 F. Supp. 224 (S.D.N.Y. 1975) and 411 F. Supp. 627 (S.D.N.Y. 1976). The opinions all appear in the appendix to the Petition.*

Jurisdiction

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered on September 30, 1976, and orders denying rehearing and/or rehearing en banc were entered on November 16, 1976.

* References to pages of the appendix to the Petition are preceded by the letter "a".

Questions Presented

The Petition does not present any questions meriting review by this Court. The issues are:

1. Was the Court of Appeals correct in holding that Ford did not discriminate in price between dealers purchasing "crash parts"* when it offered an incentive allowance to its dealers on resales of crash parts to independent repair operations and did not offer the incentive allowance to its dealers on resales to any other kind of customer, thereby affording identical price treatment to all purchasers from Ford?

2. Was the Court of Appeals correct in holding that the District Court was not clearly erroneous when it found that Ford did not agree with its dealers to restrict dealer resales of crash parts to Petitioner?

STATEMENT OF THE CASE

Petitioner ("FLM") commenced this action on February 15, 1973 in the Southern District of New York, challenging Ford Motor Company's ("Ford")** system for the distribution of crash parts for Ford motor vehicles. FLM's complaint alleged violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,*** Sections

* Crash parts are sheet metal parts such as fenders, grills and hoods which are custom designed and manufactured to fit particular years and models of motor vehicles. Ford crash parts are manufactured only by or for Ford; and Ford sells them only to its franchised dealers throughout the United States on uniform terms and at uniform prices based upon a so-called "dealer net" price which is generally Ford's suggested retail price less 40%.

** Ford Marketing Corporation, Ford's wholly-owned subsidiary and a co-defendant below, ceased doing business on December 31, 1974 and was merged into Ford Motor Company on that date. Both corporations are referred to collectively herein as "Ford".

*** 15 U.S.C. § 13(a).

1 and 2 of the Sherman Act* and Sections 3 and 7 of the Clayton Act.**

Ford sells crash parts *only* to Ford dealers. *FLM is not itself a Ford dealer and has never purchased crash parts from Ford.* FLM's dispute with Ford arises from the terms and conditions under which Ford grants an incentive allowance to its dealers on their resales of crash parts.

Since the 1950's Ford has made available an incentive allowance to dealers for routine automotive replacement parts such as spark plugs, filters and batteries when Ford dealers resell them to independent retailers. The allowance was first extended to dealer resales of crash parts in 1968 at the urging of the Federal Trade Commission "that independent auto repair shops be permitted to obtain crash parts at prices that would enable them to compete with Ford dealers in the repair business." (p. a-19).*** It was hoped that the availability of an incentive allowance on crash parts would encourage dealers to resell them to independent repair shops at prices approximating "dealer net"—the price dealers paid when they used similar parts in their own repair operations. As the Court of Appeals stated (p. a-9), the allowance " was designed to equalize the prices at which independent repair shops could obtain Ford parts with the prices paid by Ford dealers for the same parts."

Until the incentive allowance's requirements were revised in 1971, it was available to dealers on crash parts

* 15 U.S.C. §§ 1, 2.

** 15 U.S.C. §§ 14, 18. These Clayton Act claims were abandoned before trial.

*** Contrary to the representation in the Petition (p. 11), the Commission never "advised" Ford that its method of distributing crash parts was "an unfair method of competition." The Commission only indicated that it was conducting an investigation of Ford's method of crash part distribution.

sold to almost any customer who purchased the parts for resale, the only exception being sales directly to another Ford dealer. A 1969 study of the incentive system as it applied to all Ford automotive replacement parts (not merely crash parts) revealed that, because of an unintended definitional loophole in the eligibility requirements, dealers were claiming the allowance on sales to customers such as other dealers by utilizing intermediaries (including wholesalers) as conduits. As the Court of Appeals noted (p. a-11), Ford's study indicated that "as much as $2.1 million of the $44.5 million in incentive payments claimed might be improper. Among other things, some dealers were selling parts to wholesale intermediaries and then claiming an incentive allowance for doing so, even though the wholesaler then resold the part to another Ford-franchised dealer." This second dealer, contrary to Ford's incentive allowance policy, might then claim a second incentive allowance for the same part by reselling it to an independent garage.

In order to close this loophole, Ford in 1971 changed the scope of the incentive allowance as it applied to all parts (including crash parts) by expressly providing that the allowance would be available to dealers only on resales to retailers (*i.e.*, customers other than Ford dealers engaged in automotive service and repair work).*

Since 1965, FLM has conducted a local business in Bronx and Westchester Counties, New York, in which it purchases Ford crash parts from Ford dealers and resells them to

* The Court of Appeals expressly recognized that "the 1971 revision of the plan was an attempt to further implement Ford's original intention of funnelling crash parts at reasonable prices to independent repair shops so as to improve competition in the auto repair business, and was not a device to circumvent the [Robinson-Patman] Act." (pp. a-19-a-20).

independent repair shops. The prices which FLM pays various Ford dealers for the parts it purchases, the terms on which it buys the parts, and the choice of dealers with which it does business are all matters of negotiation solely between FLM and the dealers; Ford has never played nor sought to play any role in such matters.

Prior to the 1971 revision of Ford's incentive allowance policy, dealers reselling crash parts to FLM received the incentive allowance on such sales. When the policy was changed to render ineligible for the allowance parts resold by dealers "to any customers not engaged in automotive service or repair work," sales to FLM no longer qualified.* Nevertheless, due to an oversight, Ford continued to pay the allowance to two dealers on their resales to FLM for 16 months—until November, 1972, when such payments were terminated. Despite the fact that since November 1, 1972 no Ford dealer has received the incentive allowance on resales of crash parts to FLM, Ford dealers have continued to fill FLM's orders—more than $1.9 million worth.

The District Court, sitting without a jury, ruled that Ford's revised incentive allowance policy was a form of price discrimination in violation of the Robinson-Patman Act. At the same time, the District Court dismissed each of FLM's Sherman Act claims based on factual findings that there was no evidence of any agreement between Ford and any dealer not to resell crash parts to FLM or to fix the dealers' prices to FLM; that FLM's claim of an illegal

* The Petition suggests (p. 29) that the Commission has disapproved of Ford's incentive allowance by announcing that it will not approve discounts to a wholesaler "contingent upon the imposition of specified restrictions upon his customers by him." Since Ford places no restrictions whatsoever on how its dealers may dispose of crash parts once they buy them—much less on what the dealers' customers may do—Ford's incentive allowance policy is in no way inconsistent with the cited Commission advisory opinion.

combination between Ford and its wholly-owned marketing subsidiary was unsupported by the evidence; and that there was no substance whatsoever to FLM's charges of monopolization.*

A unanimous Court of Appeals reversed the District Court's finding of price discrimination,** since Ford's incentive allowance policy treated all of its purchasers equally, and affirmed the District Court's dismissal of the Sherman Act claims. Because the Court of Appeals reversed the District Court's finding of discrimination as a matter of law, it did not reach other issues raised by Ford, such as FLM's standing (as a non-purchaser) to litigate a Section 2(a) claim, whether the incentive allowance was injurious to competition, and whether damages were properly proven.***

There Are No Reasons for Granting the Writ

The decision of the Court of Appeals was eminently correct, was fully in accord with all applicable precedents and legal principles, and raises no issue warranting review by this Court.

A. This Case Presents No Substantial Question Under The Robinson-Patman Act

The Court of Appeals held that Ford did not violate the Robinson-Patman Act because it afforded precisely equal treatment to each and every one of its purchasers of crash

* The Petition does not seek review of either of these latter two determinations which were affirmed by the Court of Appeals.

** Judges Mansfield, Oakes and Gurfein. Judge Mansfield wrote the Court's opinion.

*** These issues would have to be decided adversely to Ford in the Court of Appeals before FLM could recover damages under its Robinson-Patman Act theory.

parts. That holding, which derives from "the plain language of the Act"* and is in keeping with every decided case and every acknowledged authority, presents no issue meriting review by this Court.

Section 2(a) provides, in relevant part:

> "that it shall be unlawful for any person . . . *to discriminate in price between different purchasers* of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to . . . injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them." (Emphasis added).

As the Court of Appeals noted (p. a-13), the statute by its very terms applies only when the defendant discriminates in price between "different purchasers." Ford has not discriminated between different purchasers. No purchaser from Ford has been treated differently from any other purchaser; all are afforded identical price treatment.

Since FLM has never been a purchaser from Ford, either direct or indirect, the only claim of "discrimination" made here is based on the difference between the price a dealer pays for crash parts when he resells them to an independent repair shop and the higher price a dealer pays when he disposes of the parts in any other manner—including use in his own repair operation or resale to FLM. But that difference, as the Court of Appeals held, is not a discrimination because equality of treatment is the very antithesis of discrimination; every Ford dealer was treated alike in the pricing of crash parts purchased from Ford. Every dealer reselling to FLM paid the same price to Ford; and the same was true with respect to every dealer

* (p. a-13).

reselling to independent repair shops. Thus, there was no favored dealer, no disfavored dealer, no price discrimination and no violation of the Robinson-Patman Act. In the Court of Appeals' words (p. a-21), "having treated its dealers equally here, Ford fulfilled its duties under the Act."

FLM makes no effort to reconcile its position with the language of Section 2(a). It simply ignores what the statute says—that the discrimination be between different purchasers.

Unable to quarrel with the soundness of the Court of Appeals' legal analysis, FLM argues that the decision below would nullify the Robinson-Patman Act by enabling any seller wishing to avoid its strictures to do so by "the simplest subterfuge of having an intermediate level of distribution." (Petition, p. 35). It cites the hypothetical case of a seller desiring to grant a chain-store purchaser a lower price than a competing retailer. To effectuate this scheme according to FLM, the seller could simply create a new "wholesaler" and provide it with a discount only on sales to chain stores. (Petition, pp. 22-23). Aside from the fact that success of such a subterfuge could not be guaranteed without illegal vertical price fixing,* FLM's hypothetical case bears no resemblance whatsoever to this one. First, the purpose of Ford's incentive allowance was to make it possible for independent repair shops to purchase crash parts from Ford dealers at the *same* price such dealers purchased similar parts from Ford for use in their own repair operations. Second, Ford did not create an intermediate level of distribution; it has at all times sold crash parts exclusively to its franchised dealers. It

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* Only in such circumstances could the seller be certain that the "wholesaler" would pass on its lower price to the chain store for whose benefit the scheme was designed.

was *FLM* which inserted itself as an additional distributional link and then complained when Ford did not offer the incentive allowance to dealers reselling to FLM.

Moreover, the Court of Appeals took pains to dispel any notion that its ruling could be construed to permit evasion of the Robinson-Patman Act by subterfuge:

> "We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers . . ., which had the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it." (p. a-18).

Here, however, the record does not support any "inference that Ford's incentive payment plan has been simply a device to achieve indirectly a price discrimination forbidden by the Act." (p. a-19). To the contrary:

> "[T]he record indicates that the 1971 revision of the plan was an attempt to further implement Ford's original intention of funnelling crash parts at reasonable prices to independent repair shops so as to improve competition in the auto repair business, and was not a device to circumvent the Act." (pp. a-19-a-20).

FLM strains to find some inconsistency between the Court of Appeals' ruling and this Court's decisions in *FTC* v. *Anheuser-Busch, Inc.,* 363 U.S. 536 (1960); *Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969) and *FTC* v. *Fred Meyer, Inc.,* 390 U.S. 341 (1968). No such inconsistency exists. Both *Anheauser-Busch* and *Perkins* were cases involving different prices to different purchasers from the allegedly discriminating seller. Significantly, in each case the disfavored purchaser had been a direct buyer from the alleged discriminator. Here, FLM was not a purchaser from Ford and FLM's suppliers, which did purchase from Ford, were all treated equally.

The statement in *Anheuser-Busch* that "a price discrimination . . . is merely a price difference" (363 U.S. at 549) does not mean that a dual pricing system offered and (realistically) available to all customers equally is discriminatory. Such a wooden reading would brand as discriminatory such normal business practices as cash discounts for prompt payment or quantity discounts available to even the smallest customer, whenever one purchaser elected not to avail himself of the lower price. *Anheuser-Busch* has never been interpreted to yield so unrealistic a result. See F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 97 (1962).* Moreover, as the Court of Appeals pointed out, *FTC* v. *Borden Co.*, 383 U.S. 637 (1966), made it "clear that the language in *Anheuser-Busch* does not imply that the Robinson-Patman Act requires the uniform pricing rigidity FLM here asks but, on the contrary, permits a seller to offer dual prices to its customers on an equal basis." (p. a-15). In *Borden* this Court remanded for a determination of whether an admitted price differential was "discriminatory within the meaning of the Act" (383 U.S. at 646)—a holding totally at odds with the notion that every price differential is automatically a price discrimination.** *See also FTC* v. *Morton Salt Co.*, 334 U.S. 37, 42 (1948).

* *See, e.g., Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F.2d 768, 770 (8th Cir.), *cert. denied*, 293 U.S. 590 (1934) (under original Section 2 of the Clayton Act); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 389 F. Supp. 1334, 1341 (N.D. Calif. 1975); *Tosa Chrysler-Plymouth, Inc.* v. *Chrysler Motors Corp.*, 1974-1 CCH Trade Cas. ¶ 75,006 (E.D. Wis. 1974); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 644 (9th Cir. 1969); *Cannon Mills, Inc.*, FTC Docket 7494, p. 47 (initial decision Dec. 3, 1963), *aff'd without opinion*, 65 F.T.C. 408 (1964).

** The Court of Appeals also correctly distinguished *Anheuser-Busch* as a case "dealing with a claim of primary-line territorial price discrimination under which Anheuser granted lower prices to dealers in the St. Louis area, but not to those located elsewhere

(footnote continued on following page)

As for *Perkins*, the opinion below disposes of FLM's argument:

> "In that case, it was established that the seller had discriminated in price against some of its purchasers; the only question was [the] level of distribution at which the requisite competitive injury could be shown." (p. a-16, n.6).*

Fred Meyer also has no bearing on the present case because it involved a different Section of the Robinson-Patman Act from that involved in this case. *Fred Meyer* "did not invoke § 2(a)'s applicability to price adjustments" (p. a-17), but rather concerned Section 2(d)'s prohibition of promotional allowances which are not proportionally equal. As the Court of Appeals explained:

> "[T]he Court [in *Fred Meyer*] did not suggest that it intended, by analogy or otherwise, to interpret § 2(a) as requiring a manufacturer to equalize prices charged to those performing different functions in

(footnote continued from preceding page)

for the purpose of driving out competition." (pp. a-14-a-15). FLM's effort to cast doubt on that distinction is not only unavailing but the cited authority is mischaracterized. The Petition asserts (p. 30) that the *Anheuser-Busch* formulation applies "in situations not dealing with primary line cases," citing *Hampton* v. *Graff Vending Co.*, 478 F.2d 527 (5th Cir. 1973). The *Graff Vending* case was in fact found by the Court of Appeals to be a case of primary-line territorial discrimination precisely like *Anheuser-Busch*. (478 F.2d at 532).

* The Petition also suggests that the decision of the Court of Appeals conflicts with *Mueller Co.* v. *FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). Again, the court below provided the complete answer: "[T]he gravamen of the discrimination found in Mueller was not the provision of the 10% discount to jobbers as compensation for their wholesaling services, but rather the fact that eligibility to enter this favored class was only selectively recognized and not made equally available to all jobbers. Here, in contrast, Ford did not arbitrarily select some of its dealers and limit incentive payments to them. Rather, such payments were available to all Ford dealers purchasing from Ford." (pp. a-20-a-21).

the line of distribution. Indeed, to do so, as Justice Harlan's dissent in *Fred Meyer* noted, 390 U.S. at 361, would be to run afoul of the Sherman Act. If, in order to avoid violation of the Robinson-Patman Act, Ford were required to fix the prices at which FLM purchased parts from Ford dealers so that the prices to both would be equalized, Ford would be open to the charge of illegal price fixing." (p. a-18).

In the final analysis, the decision of the Court of Appeals, holding that there can be no price discrimination between purchasers when all purchasers are treated alike, is unassailable as a matter of statutory language, precedent and common sense. There is accordingly no Robinson-Patman issue meriting Supreme Court review.

B. This Case Presents No Substantial Question Under The Sherman Act

The Court of Appeals' ruling affirming the dismissal of FLM's claim under Section 1 of the Sherman Act applied well settled principles of law to the facts as found by the District Court. Indeed, a method of pricing similar to that challenged here was recently approved by this Court in *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.*, 425 U.S. 1 (1976). Moreover, the judgment below does not conflict with any decision of other courts of appeals.

The Court of Appeals correctly interpreted *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), to hold "that an 'explicit agreement or . . . silent combination or understanding restricting the persons to whom . . . goods might be resold [is] an essential condition of a *per se* violation" of Section 1. (p. a-24). The absence of that "essential condition" is dispositive here. The Court of Appeals unanimously affirmed the District Court's express finding that there was no agreement or understanding between Ford

and its dealers restricting the customers to whom or the prices at which such dealers could resell crash parts. (pp. a-70; a-24). To the contrary, Ford dealers were free at all times to resell crash parts to FLM at any price mutually agreeable to FLM and the dealers—and they in fact did so.*

Far from there being any inconsistency between the decisions below and prior authority, the opinions of the lower courts here are squarely within this Court's recent decision in *Abbott Laboratories* v. *Portland Retail Druggist Assn., Inc.*, 425 U.S. 1 (1976). In that case, which involved the scope of the Robinson-Patman Act exemption granted under 15 U.S.C. § 13c for sales of supplies to non-profit institutional purchasers "for their own use," Abbott, a drug supplier, expressed concern that a pricing system which took account of the subsequent use of drugs by nonprofit institutions might run afoul of *Schwinn* and subject suppliers to "retroactive exposure to claims." (425 U.S. at 20).

In responding to Abbott's contention, this Court completely disposed of FLM's Section 1 theory here. Justice Blackmun, speaking for the Court, concluded that while Abbott's concern was "understandable," it was "over-

* Petitioner's reliance on *Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968), and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) (Petition, pp. 39, 41), is totally misplaced. In *Albrecht*, defendant sought to coerce plaintiff into lowering his resale prices by partially terminating his delivery route, seeking to solicit customers away from him and employing a temporary replacement until such time as he acquiesced in defendant's resale pricing policies. 397 U.S. at 147-48. Similarly, in *General Motors*, dealers were coerced into refusing to deal with automobile discounters by a variety of tactics, including personal threats to errant dealers "to knock their teeth down their throats" if they continued selling to discounters. 384 U.S. at 136. In the words of this Court, *General Motors* presented a "classic conspiracy in restraint of trade." 384 U.S. 140. Here, by contrast, the District Court's factual findings preclude any such conclusion, as the Court of Appeals pointed out. (p. a-23).

stated": a supplier's adjustment of its sales price based on records submitted by non-profit customers, indicating the post-sale use of the product by such customers, would not subject the supplier to antitrust liability under *Schwinn*. (425 U.S. at 20-21).

This Court's invitation in *Abbott* to engage in the record-keeping necessary to effectuate dual pricing to the same customer—which is precisely what Ford does with respect to crash parts—is fundamentally inconsistent with any suggestion that such dual pricing could constitute a post-sale restraint in violation of Section 1.

Nor is there any merit in FLM's contention that two court of appeals decisions are in conflict with the decision below. (Petition, pp. 37-38). Both cases are wholly inapposite.

In *Reed Brothers Inc.* v. *Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976), the issue was whether there was sufficient evidence of an agreement between Monsanto and its distributors restricting distributor resales to wholesalers to support a jury verdict for the plaintiff. The Eighth Circuit concluded that there was "clear evidence" from which the jury *could* have found that Monsanto's "rebate" policy was a "cooperative program amounting to a 'contract, combination . . . or conspiracy' . . ." (525 F.2d at 496). The Court of Appeals expressly noted that although the avowed purpose of Monsanto's rebate program "was to help cover higher costs incurred by distributors" selling to retailers, its "direct effect was simply to eliminate wholesalers and discounters." (*Id.* at 490). Moreover, the rebate policy was intertwined with territorial restrictions which the Eighth Circuit found were "firmly and resolutely enforced" by Monsanto through warnings to distributors not to sell to plaintiff. (525 F.2d at 495-496). Here, on the other hand, the District Court specifically found no agreement—Ford dealers were free to resell crash parts to any customers, anywhere—and FLM's own evidence showed that FLM purchased almost $2 million worth of crash parts from Ford dealers after Ford's incentive policy revision became effective with respect to resales by dealers to FLM. These facts fully distinguish *Reed Brothers*.

Equally beside the point is *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976). In that case—unlike this one—it was undisputed that the plaintiff-franchisees had entered into written contracts with the defendant-franchisor which contained provisions obligating the franchisees to pay 55% more royalties to the franchisor on sales made outside the franchisees' "areas of primary responsibility." The question considered by the Fifth Circuit was whether such contractual provisions were agreements for purposes of Section 1 if they were not "firmly and resolutely enforced." The Court answered the question affirmatively. (537 F.2d at 1318). No such issue is presented here, since there were no agreements in the first place. Ford unilaterally offered an allowance to those of its dealers who resold crash parts to retail customers; it was entirely up to the dealers to decide whether to resell to such customers and at what prices and terms. The Court of Appeals correctly observed that the "logic" of FLM's argument (*i.e.*, that a unilaterally offered discount to dealers reselling to retailers violates Section 1) "not only ignore[s] the language of § 1 but in effect require[s] that all functional discounts be outlawed." (p. a-25). Such a proscription of long sanctioned market practices finds no support "in § 1 or elsewhere." (*Id.*).

In sum, there is no substance to FLM's Sherman Act claim. The courts below correctly disposed of it on the facts, and it raises no issue meriting review by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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